Vickie A. Askins
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March 31, 2016

Administrator Gina McCarthy
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Addendum #3 to November 2011 Petition

Dear Administrator McCarthy:

The main purpose for this letter is to caution you, once again, about the threat Ohio's unlawful split/phased permitting programs for concentrated animal feeding operations (CAFOs) poses to the safety of Lake Erie and other waterways. We believe there will be dire consequences if you continue to ignore this pollution threat. The ongoing Flint drinking water crisis is similar to Toledo's drinking water crisis in 2014 - because State and federal officials did not do their jobs, people were harmed.

After the Flint drinking water crisis was made public, you sent a memo to your staff instating a formal policy "to elevate critical public health and/or environmental issues so that the agency can properly assess them and respond at appropriate policy and governmental levels." Not to diminish the ongoing tragedy in Michigan, but the Flint drinking water crisis has impacted less than 100,000 residents. As you know, Lake Erie provides drinking water to over *11 million people*.

We submitted a Petition to your predecessor in November 2011 forewarning EPA that the permits being issued by the Ohio Department of Agriculture (ODA) allow CAFOs to spread millions of gallons and megatons of untreated nutrient-rich animal waste with no accountability and very little oversight. We believe the toxic algal bloom crisis in Lake Erie is at least partially due to EPA's lax oversight over CAFOs in the western Lake Erie basin.

Accordingly, we implore you to finish your much overdue review of our 2011 Petition. We feel strongly that we need to meet without delay to discuss the widespread problems with Ohio's split CAFO permitting programs. Susan Hedman ignored our Petition as well as our repeated requests to meet. Now that she has resigned, please ask Robert A. Kaplan, Acting Regional Administrator, to respond to our Petition with a sense of urgency and purpose!

Ignoring our Petition for four years has been very disappointing but fighting to deny us our right to file a Citizens Suit was devastating. It was especially so after the DOJ attorney told the appellate court we should have filed a Petition instead of a Complaint! Our goal was to help you do your job by applying pressure to do the right thing thru the petition and the courts but, it has become very apparent, the pressure to do the wrong thing is much stronger.

According to comments made by Congress 20 years ago about State Permit Programs, the implementation of water pollution control measures would depend, "to a great extent upon the pressures and persistence which an interested public can exert upon the governmental process." Especially in light of Sec. 101(e) that public participation be "provided for, encouraged, and assisted by the **Administrator** and the States...it is inconceivable that other forms of public participation in the State administrative process - - to be a meaningless exercise."

In addition to our past "pressures and persistence", please accept this letter as Addendum #3 to the 2011 Askins/Firsdon Petition in which we requested all NPDES permitting authority for CAFOs be removed from the State of Ohio. This Petition included almost 200 pages of documentation supporting our claims and detailing numerous unlawful practices utilized by the ODA in connection with CAFO permits.

1. **ADDENDUM #3 filed under 40 C.F.R. § 123.62(c)** –
   40 C.F.R. § 123.62(c) States with approved programs must notify EPA whenever they propose to transfer all or **part of** any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section.

2. **TIMELINE** of our previous attempts as concerned citizens to urge EPA to restore **all parts** of the NPDES permit program for CAFOs to Ohio EPA (OEPA), the only State agency authorized by U.S. EPA to administer the NPDES permit program in Ohio for CAFOs:

- November 9, 2011 – We submitted a 200-page Petition to U.S. EPA alleging and documenting serious problems with Ohio's NPDES permit program for CAFOs. Region 5 has not responded to our Petition other than to acknowledge receipt. In addition to CWA violations, EPA's failure to respond to the Petition within a reasonable time also appears to violate the Administrative Procedure Act, 5 U.S.C. § 551.
  NOTE: Citizens of Putnam County filed a Petition with EPA on October 3, 2000, and EPA met with those citizens soon after the filing. This precedent seems to refute EPA's lack of response to our Petition.

- December 26, 2012 – Petitioners filed our first Addendum asking U.S. EPA to nullify Ohio's illegitimate transfer of CAFO permitting authority. We included additional evidence to support our request to stop the ODA from issuing new CAFO permits in Ohio.

- February 15, 2013 –Petitioners filed our second Addendum transmitting additional documents to support our request to remove CAFO NPDES permitting authority from Ohio.

- February 3, 2014 – Petitioners Larry and Vickie Askins filed a Notice of Intent under 33 U.S.C. 1365 (b). Region 5 did not respond even though the *Save the Valley* decision stated – "The citizen suit provision requires that a party first give notice to the Administrator sixty days before a lawsuit is commenced. 1365(b)(2). According to this decision – "The purpose of the notice period is to allow the EPA to avoid expensive and protracted judicial litigation by addressing citizen concerns at the administrative level." Sadly, WE were forced to incur "expensive and protracted judicial litigation" because EPA refused to address our concerns at the administrative level.

- Petitioner Vickie Askins has sent many other detailed letters in 2011, 2012 and 2013 to U.S. EPA about the serious problems we have exposed with Ohio's CAFO permitting programs which we believe contribute to the toxic algal blooms threatening Lake Erie and other Ohio lakes and rivers.

- August 4, 2014 – Because U.S. EPA Region 5 ignored all of our attempts to meet, Petitioners Larry and Vickie Askins filed a complaint - *Askins et al v. Ohio Department of Agriculture et al* - in 6th District Court to which Region 5 finally responded. EPA ignored our concerns for almost three years after we submitted our Petition – but after filing the complaint, *numerous* Department of Justice and Ohio Attorney General attorneys

responded! This lawsuit would never have happened if only EPA had responded and addressed our Petition. This overdue response seems to make a mockery of the citizen suit provision in the Clean Water Act and would certainly not "encourage" public participation.

- January 13, 2015 – Defendants argued in their May 20, 2015 brief that "citizens may bring an unreasonable delay claim under the Administrative Procedure Act (A.P.A.) …Thus, the concern that USEPA could avoid judicial review altogether by not taking any action is unfounded." The Humane Society of the U.S. filed suit under the A.P.A. regarding a 2009 Petition and the Environmental Integrity Project, et al. likewise filed suit under the A.P.A. regarding a 2011 Petition. It appears EPA has not responded to either claim - so doesn't that mean that U.S. EPA "could avoid judicial review altogether by not taking any action".

- January 13, 2015 - U.S. EPA Reply Memorandum stated "The administrative petition…is currently pending as USEPA evaluates the numerous factual assertions presented in the petition, and USPEA will provide a response to the petition when that evaluation is completed."

  NOTE: We would be more than happy to provide any additional documentation required to assist U.S. EPA in their evaluation of our Petition.

- January 27, 2015 – Memorandum **Opinion** by District Court – Dismissed action for lack of subject matter jurisdiction.

- February 20, 2015 – Petitioners Larry and Vickie Askins filed a **Notice of Appeal** with the Sixth Circuit Court of Appeals.

- March 17, 2015 – **Mediation Conference Call** - Our attorney tried to warn all the parties on the call that CAFOs produce an enormous amount of manure and nutrient runoff had worsened since the ODA had started issuing permits. There was much discussion as to the nuances of PTIs, PTOs and NPDES Permits that incorporate PTO MMPs and also why U.S. EPA had not approved the ODA's program. Our attorney said we were putting our faith in the U.S. EPA to make sure these permits complied with the Clean Water Act.

  NOTE: The mediator was surprised that he had to bring ten different defendant attorneys and employees into the conference call. He mentioned that he had never had so many parties on a call before. We thought it was amazing that our lawsuit was getting so much attention when our Petition had received none.

- October 6, 2015 - The D.O.J. attorney argued at the **oral hearing** before the 6th Circuit Appeals Court that we should have submitted a *petition* instead of filing a lawsuit! Our April 8, 2015 brief stated "One of the determining factors in whether the CWA would be a success is the degree to which the public can participate in the process… The Plaintiffs tried to do just that by petitioning Defendant U.S. EPA in November, 2011. Defendant U.S. EPA did not respond to Plaintiffs' petition other than to acknowledge receipt of the petition. The only alternative left for Plaintiffs when Defendant U.S. EPA fails to respond is to file a complaint under 33 U.S.C. 1365(b)."

  NOTE: During the oral hearing - our attorney presented convincing arguments about the worsening degradation of Ohio's waters since the ODA had taken over "part of" the NPDES permit program for CAFOs. This put the DOJ and AG attorneys on the defensive as they tried to evade the merits of our case. Toward the end of the oral hearing, the chief justice asked them - how long do you think you can keep this '*scheme*' going on?

- January 6, 2016 – Sixth Circuit affirmed district court's dismissal – "While the Clean Water Act *does* require the U.S. EPA to withdraw approval of a state-NPDES program after a hearing, notice, and time to cure, it does *not* require the U.S. EPA to hold a hearing in the first place. Accordingly, the non-discretionary action does not kick in until *after* the hearing, the hearing itself is discretionary… Because the Clean Water Act prohibits this suit, we need not address the merits of the Askinses' claims."

Although our Complaint and Appeal were dismissed due to a technicality, I would respectfully ask you to review the briefs filed with our Complaint and Appeal in order to fully understand the merits of our case – and our Petition. For example:

- Why did former Governor Taft include regulations for PTIs and PTOs in Ohio's 2006 NPDES transfer application for NPDES permit program authority if PTIs and PTOs are not **part of** the NPDES permit program?

- Why did former Governor Taft include the 2002 MOA between OEPA and ODA about the "State" permitting programs unless the PTIs and PTOs were **part of** the NPDES permit program? This 2002 MOA was included with Ohio's application in addition to the 2006 MOA which contained the ODA's program as required by NPDES rules for State Programs.

- Why did ODA Kevin Elder state in his sworn affidavit– "The PTO is not administered according to the Clean Water Act and is **not** a part of Ohio EPA's NPDES permit program for CAFOs." Why would Elder swear to these ambiguous statements when he knows the OEPA incorporates ODA MMPs in NPDES Permits? It would seem that he intentionally misled you and the Court and it would also seem he may have perjured himself.

- Kevin Elder also publicly stated in 2001 - The environmental protection agency has "never had the manpower to be able to enforce the federal discharge regulation requirements." This claim seems to bring into question Ohio's entire CAFO NPDES permit program.

3. ODA MANURE MANAGEMENT PLANS ARE NOT EQUAL TO EPA NUTRIENT MANAGEMENT PLANS – We argued that ODA Manure Management Plans (MMPs) are written under State law and are not the same as Nutrient Management Plans (NMPs) that must comply with the CWA. Neither the term "manure management plan" nor the acronym "MMP" are found in the CWA. Defendants claimed "ODA's manure management plans comply with the federal standards" – but clearly that is not true or U.S. EPA should have approved the ODA's Program nine years ago!

The MMP "is the main substance of an NPDES permit application as it provides the necessary detail of the operations in order to determine the amount and type of discharge." Further, "Because Defendant OEPA requires an MMP to be **part of** an application for an NPDES permit, then an MMP is a **part of** the NPDES permit program in Ohio". Thus, OEPA has transferred **part of** their duties under the NPDES permit program to the ODA.

4. FEDERAL STANDARDS - The arguments by the DOJ maintained the OEPA will incorporate ODA MMPs "if the plan meets the federal standards." Defendants repeatedly argued that a NMP "is a planning document that contains ***site-specific*** operation and management practices that a CAFO will implement for crop production needs and water quality protection goals." The District Judge accepted the argument that the NMP and MMP "contain the same ***site specific*** information required by federal regulations" even though Defendants offered absolutely no evidence or authority to support this claim.

Other statements in Defendants' briefs:

- 1/13/15 – "The CAFO must develop and implement a nutrient management plan that… [is] based on a ***field-specific*** assessment of the potential for nitrogen and phosphorus transport from the field and that addressed the form, source, amount, timing, and method of application of nutrients ***on each field*** to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters."

- 1/18/15 "Ohio EPA accepts manure management plans developed by CAFOs for PTOs issued by ODA because those manure management plans contain the same ***site-specific*** production area and land application information, operational practices, and protocols required by federal regulations 40 C.F.R. 122.42 and 40 C.F.R. 412.4."

- C. Alexander affidavit – "Ohio EPA will accept manure management plans developed by CAFOs for PTOs issued by ODA if those plans contain the same ***site-specific*** production area and land application information."

No reasonable person would agree that an MMP is "***site-specific***" if that plan simply states "All manure is being sold to others not under the control of the CAFO owner." In that case, there is **no *site-specific*** information or ***field-specific*** assessments – it is quite simply a huge loophole! Defendants included a footnote on page 3 of their January 13, 2015 brief admitting that "Land application area means land under the control of an AFO owner or operator." It is inconceivable the writers of the CWA provided hundreds of pages of regulations that would apply only if the CAFO applies manure to *his own fields*.

The argument that ODA MMPs are merely part of a State PTO is also illogical since OEPA incorporates ODA MMPs as an integral part of a federal NPDES Permit. OEPA acknowledged via a June 2005 letter to all pending CAFO NPDES Permit applicants that ODA MMPs did **not** comply with federal NPDES laws and for that reason could **not** be used for NPDES Permits. However, the OEPA started accepting these inadequate "State" plans for inclusion in federal NPDES permits after OPEA lost their funding about 15 years ago. (See George Elmaraghy's Affidavit.)

*It is important to note that many ODA PTOs contain MMPs with **no** "site-specific" land application information! In fact, NPDES Permits incorporating these MMPs would be in violation of NPDES regulations that require "site-specific" and "field-specific" information "for each field". Defendants' repeated assertions to the contrary are false at best.*

It is disappointing that OEPA supports these inadequate MMPs since the OEPA Nutrient Reduction Strategy Report claimed - "The improper management of livestock manure and continued over application of manure on soils that are already saturated with nutrients is a significant challenge in some watersheds where livestock numbers are high. Soils in some watersheds have soil phosphorus levels that would allow generations to pass before needing additional phosphorus inputs – yet each year some of these same soils continue to receive nutrient applications. *Effective manure management is critical if we are to see water quality improvements and/or measurable reductions in nutrient loadings to our streams."*

5. (b) (6) **DAIRY – A failed example of Ohio's split permitting scheme** – Defendants offered the 2005 MMP for (b) (6) Dairy as an "example of the forms ODA created that contains NPDES requirements for ODA's proposed NPDES permit program." We would offer the detailed timeline on pages 8-12 for the (b) (6) Dairy / Dairy Acquisition 1 / (b)(6) Dairy / (b)(6) Land Company NPDES Permit as the perfect example of why Ohio's split permitting scheme is a sham. The following is a brief summary:

- In 2002 - (b) (6) **Dairy LLC** began operation with (b) dairy cows.
- In 2003 - (b) (6) had a discharge and had to apply for an NPDES Permit.

- In 2009 – (b) (6) applied for an ODA permit to expand to (b) (6) cows.
- In 2011 - OEPA approved the NPDES Permit which incorporated the ODA's MMP for (b) (6) cows. The next week, all the cows were removed and the Dairy was closed down with a full manure pond.
- In the Fall of 2011 – OEPA transferred the NPDES Permit to **Dairy Acquisition 1, LLC** – the lending institution.
- In July 2012 – OEPA transferred the NPDES Permit to (b)(6) **Dairy LLC**.
- In August 2014 - OEPA transferred the NPDES Permit to (b)(6) **Land Company**.

OEPA repeatedly instructed **all** of these owners and operators that they needed to develop an updated MMP that complied with the rules. (This seems to imply that the original MMP did **not** comply with the rules.) There were more violations over the years but, according to my records, no one has ever submitted a legitimate NMP/MMP for this facility.

(b) (6) Dairy Development was instrumental in building (b) (6) Dairy and many others in Ohio, Michigan and Indiana. In 2010/2011 (b) (6) went bankrupt (with many pending lawsuits) and so did dozens of their dairies. My information on pages 8-12 only pertains to one of these dairies. Have other bankrupt dairies had similar issues? Have there been similar transfers and cover-ups? Is EPA providing any oversight? Is lax enforcement of failed dairies by EPA contributing to the nutrient overload crisis in Lake Erie?

6. VERIFIED COMPLAINT – (b) (6) and Petitioner Vickie Askins submitted a Verified Complaint to OEPA in May 2014 listing many serious problems with the former (b) (6) Dairy. In December 2015, the Director's Final Findings and Orders admitted there was **no MMP** and fined (b) (6) $6,120. Please investigate why OEPA has not responded to the other alleged problems/violations in this V.C. - for example:

- How can a CAFO have an NPDES Permit with no MMP?
- Why did OEPA state that the ODA plans do not meet NPDES regulations but then allow (b) (6) to incorporate the ODA MMP in their NPDES Permit?
- Why did OEPA claim ODA MMPs are not a "requirement under the NPDES program" but then incorporate the ODA MMP for (b) (6) cows in the NPDES Permit for this (b) -head Dairy?
- How can any owner/operator possibly apply manure agronomically on fields when there is no valid NMP?
- Why didn't OEPA do anything about the full manure pond upon (b) (6) closure - which then provided inadequate storage for subsequent owners and operators?
- Why did OEPA penalize (b) (6) for applying manure on frozen fields since they knew the (b) (6) manure pond was full and there was no storage when they approved the transfer?
- Why would OEPA keep transferring this NPDES Permit since no one has ever provided a valid MMP?
- ***CAFOs with clay-lined manure ponds leach into groundwater and pose a significant threat to local residents who depend on wells for their drinking water. Viruses and bacteria present in manure can leach into groundwater and survive in the soil for extended amounts of time contaminating drinking water supplies. Is U.S. EPA monitoring this 14-year-old manure pond that, according to the ODA is only 8.5 feet from the aquifer, to see if it is leaking and contaminating local groundwater?***

7. RECENT LEGISLATION TO REDUCE NUTRIENTS IN LAKE ERIE - Ohio legislators have passed several Bills to reduce agricultural runoff, however, the new statutes restrict grain farmers and smaller animal operations while giving CAFOs a free pass. Attached is a letter submitted to Governor Kasich and other Ohio politicians by Petitioner Vickie Askins which elaborates on these Bills as well as the loopholes in the ODA's current rules. As Region 5 reviews the new ODA application, please be aware there are even more loopholes in the ODA's CAFO permitting program.

8. **LAX PUBLIC PARTICIPATION AND REVIEW BY ODA** - Also attached is a recent letter submitted to ODA Director David Daniels by Petitioner Vickie Askins detailing serious problems with ODA's public records policy related to a recent CAFO permit he approved. As Region 5 reviews ODA's Program/Application – please know that ODA does not comply with regulations that would ensure adequate public participation and review.

9. ADDITIONAL DATA – Attached is a large pack containing 106 pages of documents Petitioner Jack Firsdon would like to submit for our anticipated meeting with Region 5 staff.

10. SUMMARY - Administrator McCarthy, we are sure you understand there is a sense of urgency for Region 5 to complete their review of our Petition due to the nutrient loading crisis in Lake Erie which threatens the drinking water for millions of people. It is unfathomable why it has taken Region 5 more than four years to complete this review. After the Toledo and Flint water crises, residents of Northwest Ohio will not tolerate an agency whose inabilities have become a threat to our well-being. As Judge Cole questioned during the oral hearing – how long do you think you can keep this '*scheme*' going on?

Instead of replying to our Petition or meeting with us after more than four years, Region 5 has placed great efforts on reviewing the ODA's applications and also on defeating our lawsuit. We need the presence of EPA and the resources provided by our federal government to address the on-going toxic algal blooms threatening the source of drinking water for millions of residents. All of these efforts are currently being wasted because the ODA is approving more permits that allow more CAFOs to over apply more manure in the western Lake Erie basin. Knowing this, we fear it could be construed as negligence on your part if you continue to ignore this threat to Lake Erie.

We are not looking for fame or fortune – we are only trying to help you accomplish your mission "to protect human health and the environment." After losing our lawsuit, it is evident that only U.S. EPA can force Ohio to restore all CAFO NPDES permitting authority and resources to the OEPA. We all have a basic human right to clean water, but officials are not ensuring our health and well-being and instead are defending Ohio's unlawful split/phased CAFO permitting programs.

We would be honored to work with you to hold Ohio's agencies responsible for safeguarding our environment from the negative impacts of CAFO manure pollution. Make no mistake - the Flint water crisis is the canary in the coal mine. As you instructed your staff – you must "elevate critical public health and/or environmental issues so that the agency can properly assess them and respond at appropriate policy and governmental levels." After you complete your expeditious review of our Petition and supporting documentation, please contact us without delay to schedule a meeting so we can all work together to address this public health and environmental threat.

Respectfully submitted,

Jack L. Firsdon – Larry D. Askins Vickie A. Askins

Attachments

cc: President Barack Obama
Senator Sherrod Brown
Steve Edwards, Esq.

(b) (6) / DAIRY ACQUISITION 1 / (b)(6) (b)(6) LAND DAIRY

OHIO'S SPLIT CAFO PERMITTING SCHEME

To the best of my ability, the following is a timeline of innumerable events and actions related to one Dairy CAFO in Wood County, formerly known as (b) (6) Dairy, according to public records I have obtained over the years. Please note that some of these transactions were acknowledged in EPA reports and/or Orders, however, I did not actually receive copies of these documents as part of my public records requests.

Please note that **no** "updated" MMP has ever been developed and **no** "updated" MMP has been submitted to OEPA – yet OEPA has transferred this NPDES Permit three times. The manure pond still contains manure "that was generated while the operation was a CAFO" and therefore, has clearly been in violation of the NPDES Permit since (b) (6) Dairy was closed in July 2011 – almost five years ago. How long can OEPA kick this can down the road before they stop wasting their time and taxpayer money trying to prop up this failed Dairy?

- June 2002 - (b) (6) **DAIRY** - a (b) -head CAFF was developed by (b) (6) Dairy Development and occupied near Weston in Liberty Township, Wood County, Ohio.

- November 2003 – U.S. EPA and OEPA inspected (b) (6) Dairy and observed a discharge of pollutants.

- August 16, 2004 - OEPA issued a Discharge Violation Letter that stated (b) (6) was defined as a medium CAFO due to the discharge and ordered them to obtain an NPDES Permit. "As soon as possible, but in no case later than 30 days from receipt of this letter, please submit the application forms…"
- September 15, 2004 – U.S. EPA Findings of Violation and Order for Compliance to cease all unauthorized discharges and implement BMPs. This Violation letter also warned that pollutants discharged from the production area and from the facility's storm water system would eventually reach Lake Erie.
- September 15, 2004 – (b) (6) letter to OEPA in reply to August 16th letter – "we currently anticipate being able to submit the completed NPDES applications by October 15, 2004."
- November 31 [*sic*], 2004 – U.S. EPA Application for NPDES permit for (b) (6) mature dairy cows.
    - Please note that this application stated there was no NMP "being implemented by the facility" and also that the NMP was "currently being reviewed by ODA."

- January 12, 2005 – OEPA public notice of NPDES application for (b) (6) cows.
- June 21, 2005 – OEPA Melinda Harris letter to all pending CAFO NPDES applications – "The ODA review and approval process of the plans for the state program cannot be counted for the requirements of the federal program because ODA is not the authorized NPDES permitting authority, and because the plans developed according to ODA's rules…do not meet the minimum requirements of the NPDES requirements."

- April 20, 2007 – ODA Public Notice for the expansion permit from (b) cows to (b) (6) cows. According to the Fact Sheet, the PTI included the construction of two additional (b) -cow freestall dairy barns and a new earthen manure storage pond that would store 16.0 million gallons of manure.
- May 30, 2007 – ODA Public Meeting
- July 18, 2007 – ODA issued the Responsiveness Summary to public comments.
- July 19, 2007 - ODA approved the expansion permit for (b) (6) cows.

- September 18, 2009 – OEPA NPDES Fact Sheet for the (b) (6) Dairy LLC.
- November 23, 2009 – OEPA information session for the NPDES Permit held in BG. OEPA accepted ODA's MMP for (b) (6) cows as a valid NMP.
    - How could OEPA have conducted a "meaningful review" for the completeness and sufficiency of the ODA's MMP since this Dairy never housed (b) (6) dairy cows?
    - "(b) (6) Dairy LLC currently has a manure management plan developed through the Ohio Department of Agriculture in accordance with its Permit to Operate" – but not in accordance with NPDES regulations.
    - "Land applied manure shall be managed in accordance with the Manure Management Plan and requirements of the NPDES permit."

  NOTE: I have submitted many public records requests to OEPA for this Dairy's documents but OEPA has not furnished any annual reports that have detailed the total amount of manure removed, the total number of acres for land application, nor the manure distribution records. The Annual Reports show very random numbers but no proof that any of these numbers are legitimate.

- November 9, 2010 - AgStar filed a foreclosure lawsuit. The total of the four Notes was $3.6 million – the loan required interest only payments beginning on August 1, 2008 then "any unpaid balance…was due in its entirety on the maturity date [July 1, 2009]."
- November 10, 2010 - Dairy filed for Chapter 11 bankruptcy protection but this filing was later dismissed by the Court.
- **2010 Annual Report – Number of dairy cows =** (b) **No manure produced / 5,100 tons and 4,883,700 gallons land applied to 2,630 acres in MMP plus 795 acres under control of CAFO.**

- July 1, 2011 – OEPA approved the (b) (6) Dairy NPDES Permit. This permit stated under Part 1, C – SCHEDULE OF COMPLIANCE 1. MANURE MANAGEMENT PLAN – A. As soon as possible, but **no later than July 19, 2012**, (b) (6) Dairy LLC must develop and begin implementation of an updated Manure Management Plan that is created in accordance with this permit and which meets the requirements of the 2008 Federal CAFO Rule. (3) As soon as possible but **no later than June 19, 2012**, the updated Manure Management Plan shall be submitted to OEPA, Central Office, Division of Surface Water for review and availability to the public. Under (2) "It is acceptable to develop the Manure Management Plan which would be included as part of a renewal of the Permit-to-Operate issued to (b) (6) Dairy LLC by the Ohio Department of Agriculture." Under N. – In the event that this facility is closed for production purposes or is no longer a CAFO, this permit shall remain effective until the permittee demonstrates to the satisfaction of the Director that there is no remaining potential for a discharge of manure that was generated while the operation was a CAFO…**All** manure shall be properly disposed of, and in the case of facility closure, the manure storage or treatment facilities shall be properly closed."
- July 8, 2011 – **ODA** Shutdown Plan for (b) (6) s Dairy, LLC stated that "**all** manure and loose feed will be applied on to cropland according to the current Manure Management Plan (MMP)."
- July 2011 - the cows were removed, the equipment was sold, and the deed was transferred to the lending institution - **Dairy Acquisition I, LLC** "in lieu of foreclosure". The manure pond was lowered one foot below freeboard by running a line across (b)(6) Road and spreading the manure on a field west of the Dairy.
- August 11, 2011 – OEPA email response to my inquiry about (b) (6) failure to empty the manure pond - "It has been our experience that bankrupt dairies are sold relatively quickly. So, we tend to give some flexibility in terms of closure requirements but the other requirements of the NPDES permits remain in effect."
- Fall 2011 - The ODA and OEPA permits were transferred to **DAIRY ACQUISITION 1, LLC,** the lending institution. The MMP stated "As soon as possible, but no later than July 19, 2012, (b) (6)

Dairy LLC must develop and begin implementation of an updated MMP that is created in accordance with this permit and which meets the requirements of the 2008 Federal CAFO Rule."

- September 2, 2011 – Exemption from real property conveyance fee from (b) (6) to Dairy Acquisition 1- "That no money was exchanged in consideration for the Deed."
- **2011 Annual Report – Number of dairy cows =** (b) **. 3,820 tons and 3,832,500 gallons produced. Total land covered by MMP shows 3,087 acres and -0- acres under control of CAFO. Land applied 3,920 tons and 3,832,500 gallons.**

- July 5, 2012 – Wood County Commissioners letter requesting clarification from OEPA and ODA regarding the full manure pond which appeared to violate NPDES and ODA regulations.
- July 6, 2012 – OEPA transferred the NPDES Permit to (b)(6) **DAIRY, LLC** "while Dairy Acquisition 1 LLC remained the owner of the Facility."
- July 17, 2012 – ODA Director Daniels replied to W.C. Commissioners that the facility was inspected on July 2nd – manure levels "are within permitted levels" and "the facility was being properly maintained." NOTE: Compare ODA's response with OEPA's August 29, 2012 Report of their July 30th inspection that included many serious issues, including vegetation on the lagoon perimeter, inadequate containment for silage leachate, etc. Also note OEPA, whose federal authority exceeds ODA's state authority over CAFO permits, did not reply to the Commissioners.
- July 19, 2012 – ODA Permit to expand expired.
- July 21, 2012 - Someone delivered a few cows.
- August 13, 2012 – my letter to US EPA Cheryl Burdette – manure pond not properly closed. OEPA and ODA both denying responsibility.
- August 29, 2012 – OEPA Letter re: Inspection Report for July 30 inspection – "No manure should be applied to any fields unless up-to-date soil samples and manure analyses are obtained. Complaints included "the lack of a Manure Management Plan…as required by the NPDES permit / not maintaining records / not enough storage / buildup of solids in manure lagoon / mow and control vegetation / inadequate containment for silage leachate / aboveground fuel storage tanks above minimum threshold of rules, etc. "As soon as possible, but no later than October 1, 2012, you should submit a plan of action to this Office which demonstrates your anticipated manure distributions or applications this coming Fall – plus an updated MMP.
- August 30, 2012 – EPA Tinka Hyde's reply to August 13 letter – "facility is currently considered operational, and is not required to close its storage structures at this time." Contrary to Ms. Hyde's response, the NPDES Permit regulations seem to be very clear – "In the event that this facility is closed for production purposes…all manure shall be properly disposed of…[and] the manure storage…shall be properly closed." Obviously, EPA could avoid compliance with NPDES regulations "altogether by not taking any action". If EPA keeps transferring this Dairy to other entities, there would never be any action taken to force anyone to comply with the closure regulations that should have been triggered when (b) (6) closed the facility in 2011. Instead, EPA keeps kicking the manure can down the road.
- November 20, 2012 – A NOV was sent as a follow up to the August 29, 2012 letter. OEPA again requested an update within 14 days.
- December 4, 2012, the USPEA conducted an inspection. "An MMP and records associated with the MMP were not contained onsite as required by the NPDES permit."
- **2012 Annual Report – Number of dairy cows =** (b) **. 2,000 tons and 1.25 M gallons of manure produced. Zero tons and zero gallons of manure land applied.**

- January 23, 2013 – US EPA letter to (b) (6) requesting an updated MMP "by July 19, 2012" and also documenting other problems with the Permit. "(b) (6) said the waste holding ponds had been assessed this fall to ensure enough storage capacity is maintained for the winter." "Manure is **not** transferred off-site to other parties." (b) (6) "said he maintained some of the records in his head." "The nutrient management plan was not furnished to EPA after the inspection as requested. EPA has no confirmation that an updated MMP has been developed and implemented for (b)(6) Dairy in accordance with the 2008 Federal CAFO Rule."

- June 27, 2014 - OEPA replied that their Legal Office reviewed the V.C. and it was found to be valid. In response, OEPA commenced an investigation.
- August 26, 2014 – OEPA transferred the NPDES Permit to (b)(6) **LAND COMPANY**. The NPDES Permit on the OEPA website shows: "as soon as possible but no later than July 19, 2012, (b) (6) Dairy LLC must develop and begin implementation of an updated Manure Management Plan that is created in accordance with this permit and which meets the requirements of the 2008 Federal CAFO Rule.
- November 25, 2014 – DIRECTOR'S ORDERS issued – (b) (6) was ordered to pay 46,120 for civil penalties. (b) (6) could appeal to ERAC.
- **2014 Annual Report – Number of dairy cows =** (b) **. 6,399/01 tons of manure transferred. 6,340 tons and 4,876,000 gallons applied to 764.6 acres in MMP. 6,399.01 tons to Napoleon BioGas LLC.**
    - Please note – Campbell Biogas is already taking manure from another nearby dairy CAFO and manure from (b) (6) Dairy was NOT approved in their MMP/NMP.

- February 28, 2015 – OEPA NPDES Modification Expiration Date.
- March 12, 2015 – OEPA letter to "Taft Service Solutions Corp." regarding the Proposed Administrative Orders for Dairy Acquisition 1, LLC – (b)(6) Dairy.
- March 18, 2015 – my letter to U.S. EPA Adm. McCarthy asking for an investigation into the failure of the OEPA to act on violations of an NPDES Permit as detailed in our V.C. I questioned the "tortuous split/phased CAFO permitting programs in Ohio."
- February 28, 2015 - (b)(6) Modification Expiration Date. OEPA provided no new NPDES Permit when I requested all updated documents.
- March 12, 2015 – OEPA letter to (b) (6) regarding the Proposed Administrative Orders and civil penalty.
- March 18, 2015 – I wrote and asked you to investigate why we had heard nothing when this was supposed to be a prompt and thorough investigation.
- March 30, 2015 – I received another letter from OEPA that our V.C. was found to be a valid V.C and that the Central Office had completed its "thorough investigation and OEPA was currently in negotiations with the Respondents to address the violations.
- April 7, 2015 – US EPA letter to me regarding my March 18 letter regarding the failure of OEPA to act on potential violations of the (b) (6) Dairy NPDES permit.
- September 24, 2015 – OEPA letter with Attached was the "proposed" Director's Final Findings and Order.
- October 7, 2015 – I emailed OEPA attorney Simcic and asked why the "Proposed Administrative Orders" stated that OEPA was finalizing the attached Orders since the Orders did not address many serious issues detailed in our V.C. I also questioned "the lack of a Manure Management Plan for this Facility" since the current owner was currently applying manure to some nearby fields. I asked for an updated MMP - - but Mr. Sincic did not reply.
- December 9, 2015 – OEPA Director's Final Findings and Orders to our V.C. The Final Orders "noted the **lack of a Manure Management Plan** ("MMP") for the Facility, as required by the NPDES permit." How can this CAFO have an NPDES Permit with no MMP? What about the manure that's been in the pond for over four years? How could
- **2015 Annual Report – none yet submitted.**

March 31, 2016

Summary of Recent Nutrient Reduction Legislation
Specifically Pertaining to Manure

Lake Erie is a vital resource for millions of residents and visitors but it has been threatened for many years with excessive nutrients that have fueled harmful algal blooms. Rising levels of phosphorus caused deadly toxins that resulted in a drinking water crisis for over 400,000 Toledo-area residents in August 2014 as well as an emergency shutdown of a municipal water treatment plant in Carroll Township in September 2013.

Many significant studies have been published over the past five years regarding the nutrient pollution crisis. These studies found that agriculture was a leading source of the excess phosphorus, especially dissolved reactive phosphorus (DRP), to our rivers and lakes. The major sources of agricultural nutrient pollution are excessive runoff from commercial fertilizer and also from animal manure.

Grain farmers have significantly decreased their use of commercial fertilizer over the past 20 years. However, there has also been a considerable increase in the application of animal manure to farm fields during this same time period. This is because of a dramatic increase of concentrated animal feeding operations (CAFOs) especially in the western Lake Erie basin and the Grand Lake St. Mary watershed. The growth of industrial animal production concentrates thousands of animals on increasingly fewer farms. These mega farms produce far more waste than can be safely applied to local farm fields and, once the fields become saturated, the waste can and has run off into nearby streams and rivers.

Ohio's laws have not kept pace with industrial animal production and the massive amounts of manure generated by these facilities. With the passage of Senate Bill 150 last session, Senate Bill 1 in March, and House Bill 64 in the Governor's Budget Bill this past June, legislators claim they have improved regulations to better address nutrient runoff and harmful algal blooms in the western Lake Erie basin. Sadly, these bills have mainly exempted one of the largest sources of nutrients, CAFOs. Below is a synopsis of the aforementioned legislation:

SENATE BILL 150 – The 130th General Assembly passed SB 150 in early May, it was signed by Governor Kasich on June 5th and became effective on August 21, 2014.

Senate Bill 150 was touted as Ohio's nutrient management bill to reduce major sources of agricultural nutrient runoff and improve water quality in places like Lake Erie. Instead it became the fertilizer bill aimed at reducing chemical fertilizer runoff into Ohio's waters. Republican leaders refused to include "manure" in the definition of "fertilizer" even though manure management was deemed critical by the Ohio EPA and despite being urged to do so by other legislators. This Bill specifically exempted the largest manure producers, concentrated animal feeding operations (CAFOs).

New ODNR / SWCD regulations:

- 905.31 – Definitions:

  (D) Revised definition of "Fertilizer" retains the exclusion for animal manure.

  (U) "Director" means the director of ODA.

  (Z) "Agricultural production" means the cultivation, primarily for sale, of plants...on more than fifty acres.

  (DD) – Definitions for a "Voluntary nutrient management plan":
  - The OSU developed and is administering the certification plan in the form of the Ohio nutrient management workbook. See here.
  - A comprehensive nutrient management plan developed by USDA NRCS (taxpayer subsidized).

- 905.321 - Fertilizer applicator certification program – requires all applicators of fertilizers on more than 50 acres to be certified by the ODA before September 30, 2017.

- 905.322 (A)(1) ODA Director shall create the fertilizer applicator certification program. See here.

  (2)(f) Requirements for the maintenance of records include date, place, and rate of application of fertilizer but these records are **not** be required to be submitted to ODA (in other words, **not** available as public records).

  (3)(B)(1) The ODA Director **may** adopt rules to establish criteria for who **may** be exempt from this training.

- 905.323 (A)(1) Voluntary Nutrient Management Plan (NMP) - A person who owns agricultural land **may** develop a voluntary NMP and **may** request SWCD to develop that plan for them (taxpayer subsidized).

  (B) If the NMP is disapproved, the person **may** request a hearing and also **may** appeal the disapproval.

- 905.324 Non-disclosure - The ODA and SWCD shall **not** disclose any of the information in the NMP. They **may** disclose to a federal, state, or local agency as long as that person does **not** disclose the information.

- 905.325 Affirmative defense - allows farmers to obtain an affirmative defense to civil actions for claims resulting from the application of fertilizer and **not** have to pay damages.

- 905.501 Enforcement – the director **may** conduct a hearing to determine whether violations have occurred and **may** require the violator to pay a penalty.

Revised ODNR / SWCD regulations:

- Under 1511.01 definitions:

  (F) "Operation and management plan" means a written record approved by SWCD or ODNR chief for the owner of agricultural land or a (removed the word "concentrated") animal feeding operation to abate the degradation of the waters of the state by manure, among other sources.

  (G) "Residual farm products" – removed "animal waste" and "animal excreta".

  (I) "Manure" means animal excreta.

  (J) "Animal feeding operation" includes operations with confined animals but excludes Chapter 903 CAFOs.

- 1511.02 (E)(5) and (6)Agricultural Pollution Abatement – grants for operation and management plans for (removed the word "concentrated") animal feeding operations and eligibility for "state cost sharing" (taxpayer subsidized).

- 1511.021 (C) Affirmative defense - Any person can file a complaint regarding nuisances involving agricultural land or an (removed the word "concentrated") animal feeding operation but affirms an affirmative defense if the person is operating under an approved operation and management plan.

- 1511.023 (B) Non-disclosure – the ODNR shall **not** disclose any information if someone is operating under an approved operation and management plan. ODNR **may** disclose to a federal, state, or local agency as long as that person does **not** disclose the information.

- 1511.071 Agricultural pollution abatement fund – administered by ODNR chief and **may** be used to pay costs in investigating and abating agricultural pollution or [redacted] of manure. (taxpayer subsidized)

- 1515.02 – The Ohio soil and water conservation commission now consists of the directors of ODA, OEPA and ODNR (among other appointees and one designated by SWCD) to develop and approve voluntary nutrient management plans (among other duties).

SENATE BILL 1- The 131st General Assembly passed SB 1 in March, it was signed by Governor John Kasich on April 2nd, and became effective on July 3, 2015. This Bill was aimed at protecting Lake Erie and improving Ohio's water quality.

- It authorized the ODA to administer the fertilizer provisions.
- It authorized the ODNR to administer the manure provisions for small and medium CAFFs.
- The administration and enforcement of the Agricultural Pollution Abatement Program was shifted from the ODNR to the ODA.
- Both agencies were authorized to investigate complaints.

New ODA regulations:

- Sec. 903.40 – (A) No person for the purposes of "agricultural production" (means the cultivation, primarily for sale, of plants...on more than fifty acres) in the western basin shall apply manure obtained from a CAFF "issued a permit under this chapter" unless the person has been issued:
  - (1) a livestock manager certification (CLM under Sec. 903.07 which is a two-day training) or
  - (2) a fertilizer certification by the ODA Director ("new, lesser stringent certification" under Sec. 905 which is a three-hour training).

(B) – For purposes of (A)(2) above – only references to "fertilizer" in Sections 905.321 and 905.322 are deemed to be replaced with references to "manure".

- 905.326 (B) Prohibits the application of **fertilizer** in the western basin of Lake Erie on frozen ground, saturated soil, and during certain weather conditions if fertilizer is (1) injected or (2) incorporated within 24 hours.

(B)(3) - A new exception (loophole) occurs if fertilizer "is applied to a growing crop".

(C) - If complaints – the director **may** investigate, **may** enter, and **may** apply for a search warrant.

(D) -This prohibition does **not** affect restrictions in Chapter 903 for CAFFs/CAFOs.

- 905.327 – (A) and (B) - The director **may** assess a civil penalty; **may** impose a civil penalty only if opportunity for adjudication hearing; **may** issue an order and assess the civil penalty.

New ODNR / SWCD regulations:

- Sec. 1511.10 – (A) Same provisions and exceptions as 905.326 above but covers **manure** applications in the western basin from small and medium CAFFs – including winter manure application to a growing crop.

(B)(4) Contains a new emergency exception. ODNR Chief approves application under USDA NRCS Standard Code 590.

(C) If complaints – the ODNR chief **may** investigate, **may** enter, and **may** apply for a search warrant.

(D) This section does not affect any restrictions established in Chapter 903 CAFFs/CAFOs.

- Sec. 1511.11 – (A) and (B) ODNR chief **may** assess a civil penalty; **may** impose a civil penalty if opportunity for adjudication hearing; **may** issue an order and assess the civil penalty.

  (D) Contains new manure restrictions and temporary exemptions for small and medium animal operations plus the opportunity to request technical assistance from SWCDs (taxpayer subsidized).

HOUSE BILL 64 – Governor Kasich signed the budget bill or HB 64 on June 30, 2015, but it is important to note that this Bill was much more than a spending bill. Buried in the nearly 3,000 pages was an amendment that included many of the same regulations over industrial animal operations that had just been passed a few months earlier as part of Senate Bill 1. However, the authority, enforcement duties, and funding responsibilities were switched from the Ohio Department of Natural Resources (ODNR) to the Ohio Department of Agriculture (ODA) in HB 64.

According to Wikipedia – "bait and switch" is defined as introducing legislation with the ultimate objective of substantially changing the wording at a later date in order to smooth the passage of controversial amendments without expected negative community review. Please note that the mission statements for these two State agencies differ significantly. The ODNR's mission is to ensure a balance between wise use and protection of our natural resources for the benefit of all. The ODA's mission is to provide regulatory protection to producers and agribusiness.

According to a March 2015 Columbus Dispatch article, the ODA currently certifies manure use for the 200 CAFOs in Ohio but HB 64 would "shift responsibility for overseeing runoff at the rest of the state's 74,000 farms." The Dispatch commented that while this could simplify the program, "the sheer scale of the change could pose a challenge for the Department of Agriculture." This gives ODA responsibility over all farms and farm runoff which, in effect, makes the ODA a "one-stop shop" for nutrient issues in Ohio. It is important to note that the ODA is currently petitioning the US EPA (once again) for authority over the NPDES Permits for CAFOs as well. This additional challenge would add yet another layer of complexity to an agency that obviously allows CAFO owners to utilize loopholes to circumvent Ohio's laws. It would also make the ODA a "one-stop shop" for CAFOs.

HB 64 contained numerous minor revisions to Sec. **903** (the CAFO section of the ORC) mainly to delete regs for Review Compliance Certificates. Under current Sec. 903.04 (Eff. Date 11/05/2003) – "A review compliance certificate is valid for a period of five years." All of the RCCs have expired so these amendments merely cleaned up obsolete language.

Sec. 903.07, Livestock Manager Certification, is referenced many times in other 903 sections but there was only one minor revision in H.B. 64 to 903.07 due to the deleted RCCs. This regulation still states that CLMs are only required for Major CAFFs and only if they land apply annually "the volume of manure established in rules adopted by the director". ODA rules establish these volumes as more than 4,500 dry tons or 25 million gallons of liquid manure. The new language in Sections 939 and 940 regarding CAFOs could have worked if the ODNR had maintained enforcement over regulations for small and medium AFFs. However, now that HB 64 switched these sections under the authority of ODA, the new regulations conflict with the ODA's existing CLM regulations found in Sec. 903.07. It is important to note that there were no revisions to Sec. 903.07 in HB 64 to clarify that any new overriding regulations for CAFFs/CAFOs in the western basin would be found in Sections 939 and 940.

903.082 – still states "The director of agriculture **may** determine that an animal feeding facility that is **not** a CAFF (in other words, a small or medium AFF) has to apply for a PTI and possibly a PTO - but removed language that this would result from an ODNR order.

903.25 – An owner of an AFF who holds a PTI, a PTO, or a NPDES permit or who is operating under an operation and management plan under 939.01 approved by the ODA Director **–or-** by the SWCD supervisors under 940.06 – shall **not** be required to obtain a license or permit pertaining to manure by any officer, agency, commission, etc.

905.31 –The definition of "fertilizer" was **not** changed to include - -"manures unless mixed with fertilizer materials".

Sections 939 and 940 contain numerous new and revised regulations which were switched to ODA from ODNR Sec. 1511 and from SWCD Sec. 1515 effective 1/1/2016.

Key to the "Bait and Switch" Scheme:

- 939.01 (1511.01 repealed) all new
- 939.02 (was 1511.02)
- 939.03 (was 1511.21)
- 939.04 (was 1511.022)
- 939.05 (was 1511.05)
- 939.06 (was 1511.03)
- 939.07 (1511.07 repealed) all new
- 939.08 (was all new 1511.10 in S.B. 1)
- 939.09 (was all new 1511.11 in S.B. 1)
- 939.10 (was 1511.071)

- 940.01 (was 1515.01 under SWCD)
- 940.02 (was 1515.02 under SWCD)
- There was nothing in HB 64 about 1501:15-5-20 – Distressed Watersheds – so it is unclear whether those regulations will remain under the authority of the ODNR or if they will somehow be transferred to the ODA as well.

939.01(A) – "Agricultural pollution" means failure...to abate the degradation of the waters of the state by...manure.

939.01(B) – "Animal feeding operation" [was in 1511.01(J)] - specifically excludes a facility that possesses a permit issued under Chapter 903 i.e. CAFOs. In other words, "agricultural pollution" by CAFO manure is **not** regulated under ORC Sec. 939.

939.01(C) – "Best Management Practices" (new definition) means a combination of practices to prevent or reduce agricultural pollution.

939.01(G) – "Ohio soil and water conservation commission" (SWCC) means the Ohio soil and water conservation **commission** established in section 940.02 of the Revised Code. This new commission is established in the ODA that was formerly established in section 1515.02 under SWCD.

939.01(H) "Operation and management plan" means a written record, developed or approved by the director of agriculture, the director's designee, **or** the board of supervisors of a soil and water conservation **district**...

939.01(K) – "Soil and water conservation **district**" (SWCD) has the same meaning as in section 940.01 of the Revised Code.

HB 64 Sections 939.02 thru 939.10 removed all duties previously authorized by SB 1 to be under the ODNR chief (under Sec. 1511) and switched them to the ODA director. For example:
939.02 - The ODA Director shall:

(A) "provide administrative leadership to soil and water conservation districts" with administering programs and training personnel;
(D) coordinate programs and agreements between SWCDs and ODA; (3) Cost sharing, grants, etc;
(G) - Employ field employees for work under Sec. 940 – "as agreed to under working agreements" with SWCDs; and all such employees of the department, unless specifically exempted by law, shall

be employed subject to the classified civil service laws in force at the time of employment." NOTE: It is unclear whether these field employees will report to ODA or to SWCD.

939.03 – A person who owns or operates agricultural land or an AFO **may** develop and operated under an "operation and management plan". The ODA Director **or** his designee **or** the supervisors of SWCDs approve the O&MPs.

939.05 – The ODA director, subject to approval by the Ohio SWCC, shall enter into agreements with SWCD supervisors pertaining to agricultural pollution abatement. The director **may** enter private property and **may** apply for a search warrant to determine compliance.

939.06 – The ODA director **may** enter into contracts and agreements and **may** accept donations, grants and contributions (taxpayer subsidized).

939.07 – The director of agriculture **may** propose...**may** include...**may** impose...**may** issue...**may** request... **may** issue...**may** enter...

939.07(A)(3)(a) & (b) includes language the ODA Director **may** impose a penalty and send written notice of the deficiencies leading to the violation, set a timeframe for the violations to cease, and *then* conduct an inspection to determine if the person is still violating the law. However, this will likely undermine any enforcement of violations that are time dependent because the "timeframe" is not defined.

939.07(F) –talks about a DISCHARGE of manure... but does not state that this would trigger an OEPA investigation for an NPDES Permit.

939.08 (was 1511.10 under ODNR in SB 1) – Exceptions that would allow surface application of manure in western basin on frozen or snow-covered fields or on saturated fields include:

- (B)(1) when injected into the ground;
- (B)(2) when incorporated within 24 hours;
- (B)(3) when applied to a growing crop; or
- (B)(4) if an emergency according to USDA NRCS practice standard 590.

(D) This section does **not** affect any restrictions established in Chapter 903 for CAFFs/CAFOs.

939.09 (was 1511.11 under ODNR in SB 1) – Penalties - The ODA Director **may** impose penalties, **may** issue orders and **may** issue exemptions for small and medium operations. The applicant can request technical assistance (taxpayer subsidized).

939.10 (was 1511.071 under ODNR) - Agricultural pollution abatement fund – switched administration from ODNR Chief to ODA Director. This fund **may** be used to pay costs incurred by the ODA under 939.07...to investigate and mitigate water pollution...caused by...agricultural pollution or [a] DISCHARGE of manure specific to AFOs – but does not state that this would trigger an OEPA investigation for an NPDES Permit.

HB 64 Section 940 removed all duties previously authorized by SB 1 to be under SWCD (under 1515.01) and switched them to the ODA Director.

(A) "Soil and water conservation district" means a district organized in accordance with this chapter.

940.02 – Established Ohio Soil & Water Conservation Commission (SWCC) in the ODA that includes the directors of ODA, OEPA and ODNR.

- Under (G) – The ODA Director coordinates the agricultural pollution abatement program. The ODA Director "*through* the division of soil and water conservation" coordinates state and local government agencies re: agricultural pollutants. The OEPA Director also "shall utilize the division of soil and water conservation" in the ODA and SWCDs in abating agricultural pollution. NOTE: It

is unclear whether ODA, ODNR/SWCD or OEPA will have authority and responsibility over this program.

6111.03- The director of EPA **may** now do any of the following: (T) develop technical guidance (U) study nutrient loading "to reduce nutrients loading in watersheds in the Lake Erie basin and the Ohio river basin." However, this section still states that the exclusions do **not** apply to CAFOs and exposes that US EPA has never approved ODA's NPDES program.

These Bills contained new laws for fertilizer and also for manure from smaller animal operations – but they specifically exempted CAFOs. Therefore, the Governor's claims in his "*Blueprint for A NEW OHIO*" that the new Bills "will prohibit manure or fertilizer from being applied to frozen, snow-covered or rain-soaked ground in the Western Lake Erie Basin" – and – "will now require anyone applying livestock manure from a Concentrated Animal Feeding Facility to obtain" a CLM - would be considered misleading at best because these new Bills did **not** close any of the ODA manure loopholes for CAFOs and, in fact, created even more.

Until our legislators force each CAFO to submit a "nutrient management plan based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters" as clearly mandated by the Clean Water Act, these token Bills will **not** reduce nutrient runoff of CAFO manure.

According to daily news reports for August and September of 2015, microcystin had been detected in Lake Erie water – but stressed that microcystin had not been detected in the drinking water. How can this be? Increasing chlorine and other disinfectants are a remedy but a heavy reliance on these chemicals can result in an elevated level of cancer-causing trihalomethanes. Supposedly a problem would only occur through "long-term exposure to trihalomethanes" but an earlier AP article stated that Toledo can "quadruple the amount of chemicals needed to get rid of the toxins in the water as it is pumped from the lake." Treatment costs have already sky-rocketed. Our legislators need to stop the source of the nutrients that fuel the algal blooms – **not** spend taxpayer money on cover ups and expensive Band-aids.

U.S. EPA has sat idly by while Ohio allows CAFOs to pollute the State's waters. Despite illegal manure spills, fish kills, drinking water and beach advisories, EPA knows that Ohio's agencies have blatantly ignored Clean Water Act regulations for factory farms but EPA has done nothing. This continued inaction in the face of Ohio's fractured regulatory programs is unacceptable and not only threatens our environment but also public health.

These Bills did not go nearly far enough. Until we have effective, enforceable laws, the algae-causing pollution will continue to threaten Lake Erie, Grand Lake St. Marys and other Ohio communities. Ultimately Ohio needs laws to ensure agricultural producers do not apply more nutrients than crops actually need to grow. Until then, our drinking water will be in danger and Ohio will be the "go-to" state for CAFOs. In fact, because our legislators have failed to close the manure loopholes, many new hog CAFFs/CAFOs are already being developed in the western Lake Erie basin. These hogs will feed a new, highly subsidized, pork processing plant being built in Coopersville, Michigan that will process at least (b) (6) hogs each day. Our legislators need to ignore the powerful agribusiness lobbyists and start protecting Lake Erie - instead of protecting factory farms.

Respectfully submitted,

Vickie Askins
(b) (6)

October 20, 2015

ODA MANURE LOOPHOLES

(Updated to include new loopholes created in SB 150, SB 1 and HB 64.)

The Livestock Environmental Permitting Program (LEPP) rules in O.A.C. Section 901:10 were developed in 2002 by a diverse group of scientific professionals from the ODNR, USGS, NRCS and OEPA, as well as environmental and farm groups. Since that time, the Ohio Department of Agriculture (ODA) has systematically revised and rescinded many of the original rules in order to approve permits which did not comply with the original Program. For example, the ODA added Director's discretion to all of the critical siting restrictions intended to prevent CAFOs from being built in environmentally-sensitive areas.

Contrary to the ODA's assertion that their Program is a model for other states - a University of Nebraska study concluded the ODA's regulations were the least stringent among the nation's top ten hog-producing states. Although the General Assembly instructed the ODA in 2000 to submit an application to US EPA in order to obtain authority over the NPDES Permit Program for CAFOs, this approval has still not been granted. Clearly, the ODA's program did not then, and still does not comply with the Clean Water Act.

Below is an explanation of numerous loopholes the ODA has incorporated into their current Program which has resulted in the over application of manure on farm fields in Ohio. This list also includes several new loopholes as a result of SB 150, SB 1 and HB 64.

1. The DISTRIBUTION & UTILIZATION LOOPHOLE - Although there are many convoluted loopholes in the ODA's CAFO permitting program, the D&U loophole is the most egregious. Over the past few years, the ODA began allowing CAFO owners to elect the D&U method of manure management - which means they can transfer/sell all of their manure to others instead of developing a legitimate manure management plan (MMP). This means the manure application fields are no longer identified, there are no soil tests, no cropping schedules, plus there is no "Nutrient management plan based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters" – as clearly required by the Clean Water Act in C.F.R. § 412.4 and the 2005 Waterkeeper Decision.

In other words – the ODA allows CAFO owners to simply elect D&U in their MMP and this means the owners do not have to include any information about the manure land application areas for the duration of the permit. Any information they do submit is kept on site and is not subject to public records laws. The ODA illogically claims "removal of manure from the control of the CAFO places the manure outside of the CAFO's obligations under the Clean Water Act."

ODA MMPs no longer consist of an actual plan to utilize the nutrients or dispose of the waste but, instead, consist of statements like – "All solid manure will be distributed to others and not under the control of (b) (6) Farms" (b) (6) chickens and 63,300 tons of poultry manure in the Maumee River watershed). In other words, CAFOs can circumvent liability for improper application by merely transferring manure for land application elsewhere, with little sunshine on what happens after the hand off. (There were no new regulations in SB 150, SB 1 or HB 64 to close this huge loophole.)

2. CERTIFIED LIVESTOCK MANAGER LOOPHOLES - New CLM regulations were included in SB 1 but - there were no revisions in SB 1 to ORC Sec. 903.07 which contains the current CLM regulations. In fact, the new CLM regulations in Sec. 903.40 for CAFFs in the western Lake Erie basin *conflict* with the existing regulations in Sec. 903.07. Consequently, the new regulations in Sec. 903.40 may not be feasible since it would be impossible for the ODA to comply with both.

According to SB 1 – No person shall apply manure obtained from a CAFF issued a permit under this chapter [903] unless they either get a livestock manager certification or a fertilizer certification. The CLM

classes run for two days and pertain to manure; whereas the fertilizer certification classes run for only three hours and pertain to fertilizers - so these classes are not the same.

The regulations in ORC 903.07 only apply to major CAFFs which house ten times the number of animals confined in a CAFO, i.e. a dairy CAFO = 700 cows so a dairy MCAFF = 7,000 cows. Please note that Ohio has NO dairies that are Major CAFFs ((b) (6) Dairy in Hardin County has (b) (6) cows). The regulations in ORC Sec. 903.07 were not changed in SB 1 or in HB 64 so it stands to reason that this CLM regulation still only applies to major CAFFs.

The current ODA rules state – "No person who is a livestock manure broker shall buy, sell, or land apply annually more than four thousand five hundred dry tons of manure or more than twenty-five million gallons of liquid manure unless the person is a certified livestock manager. This is troublesome because:

- CAFO owners simply hire two manure applicators to circumvent these excessive thresholds.
- This rule exempts CAFO owners and operators from acquiring a CLM certification.

These thresholds would supposedly allow people to apply 4,400 tons or 24 million gallons from CAFFs with no training unless the new regulations in SB 1 would pertain to manure application in the western Lake Erie basin - but they still would not apply to other areas in the State. Regardless, these people could comply with the new regulations by merely taking the 3-hour fertilizer training class. The ODA's enforcement of the CLM regulations in Sec. 903.07 has been shoddy in the past so it is doubtful this will change now that they have been assigned the new CLM duties for small and medium AFFs.

3. MANURE APPLICATION ON FROZEN OR SNOW-COVERED FIELDS BY CAFOs – Ohio's current Best Management Practices and ODA rules for land application promulgated under **ORC 903** state - NO manure application shall occur on frozen or snow-covered ground. However, the ODA rules go on to state - *BUT IF YOU DO* – you merely need approval from the ODA Director. The Director would usually be inclined to grant his approval if the alternative would be that the manure pond would breach and/or overflow. Allowing the ODA Director to have discretion over rules he is supposed to enforce is the same as having no rules.

SB 1 under Sec. 1511.10 (A) "no person in the western basin shall surface apply manure (1) on snow-covered or frozen soil; (2) when the top two inches of soil are saturated from precipitation; (3) if 50% chance of precipitation exceeding ½" in a 24-hour period; UNLESS (1) the manure is injected into the ground; (2) the manure is incorporated within 24 hours of application; (3) the manure is applied onto a growing crop; or (4) in case of an emergency, manure can be applied according to USDA NRCS service practice standard code 590. Consequently, the following new loopholes were created:

(A) Only impacts manure application in the **western Lake Erie Basin** – therefore, these new regulations do not restrict winter manure application in other areas of the State.

(B) New exemptions include:

- If applied to a **"growing crop"** (further explanation in #8 below).
- Additional exemption in SB 1 pertained if manure application is made in accordance with USDA NRCS practice **standard code 590** (further explanation in #9 below).
- (D) **Does not affect CAFOs** permitted under Chapter 903 - consequently these Bills did **not** close the current ODA manure loopholes for winter manure applications.

4. MANURE APPLICATION RECOMMENDED AT AGRONOMIC RATES – According to ODA rules "– The manure management plan shall contain information on manure to allow the owner or operator to plan for nutrient utilization at recommended agronomic rates and to minimize nutrient runoff that **may** impact

waters of the state. These rules also state "Phosphate applications between two-hundred fifty pounds per acre and five hundred pounds per acre are not recommended but **may** be made..." The appendix in the ODA rules allows STP values to be 150 ppm P for manure – however, agricultural standards affirm no more P be applied when STP = 40 ppm P for commercial fertilizer.

- According to the OSU Extension Bulletin: *Best Management Practices: Land Application of Animal Manure* AGF-208-95: There is no agronomic justification for raising soil-test phosphorus levels above those that provide adequate nutrition to the crop.

- According to numerous ODA-approved permits, the Farm Nutrient Budgets show that the Average Annual Nutrient Utilization for All Crops is approximately 60 lbs. (or 30 ppm) of P205 per acre.

- According to Kevin Elder, Executive Director of the Livestock Environmental Permitting Program (November 2009 issue of the *Ohio Farmer)* - "Restrict [manure] applications on fields testing above 50 ppm phosphorus."

- The Tri-State Agronomy Guide recommends no more P205 if STP = 40 ppm.

- OSU Extension bulletin *BMPs – A Manure Nutrient Management Program*. "In animal manure management, phosphorus (P) is the nutrient of major concern on soils with high phosphorus fertility levels. Phosphorus applied to fields as manure or commercial fertilizer can move into bodies of water during erosion and runoff events, and is largely responsible for the accelerated eutrophication of many bodies of water in Ohio. It accumulates in soils if applied in quantities greater than those removed by crops. Accumulation of phosphorus in the soil can be measured by accepted soil test procedures. Agronomic crops grown in Ohio rarely respond to applications of additional phosphorus when soil test levels exceed **30 ppm** (60 lb/acre) of phosphorus, and crops grown in soils with very high phosphorus levels may actually produce lower yields due to nutrient imbalances."

The five loopholes below (items 5 – 9) were included in the new bills, some of which ONLY apply to farmers and animal producers in the western Lake Erie basin:

5. ENFORCEMENT – New regulations in SB 150, SB 1 and HB 64 contain significant barriers which could prevent any penalties from being levied against violators. Also note that most of the enforcement regulations are entirely optional and at the ODA director's discretion due to the use of "**may**" instead of "shall" throughout the new and revised sections.

6. AFFIRMATIVE DEFENSE – SB 150 contains a "get out of jail free" loophole for complaints arising from improper fertilizer and manure applications. Any person can file a complaint regarding nuisances involving agricultural land or an animal feeding operation but this regulation includes an affirmative defense if the applicator is operating under an approved operation and management plan. An affirmative defense to a civil lawsuit or criminal charge is a fact or set of facts other than those alleged by the plaintiff or prosecutor which, if proven by the defendant, defeats or mitigates the legal consequences of the defendant's otherwise unlawful conduct. (From Wikipedia)

7. NON-DISCLOSURE – SB 1 and HB 64 both contain regulations stating that the ODNR and ODA shall **not** disclose any information if someone is operating under an approved operation and management plan. ODNR and ODA **may** disclose to a federal, state, or local agency as long as that person does **not** disclose the information. Often these plans are developed by SWCD – which means they are taxpayer subsidized – but taxpayers are denied access to this information.

8. GROWING CROP EXEMPTION for winter manure applications – This is a new loophole in SB 1 and HB 64 which could allow CAFOs to apply manure on frozen or snow-covered fields if they are planted with cover crops. "The USDA NRCS recently released $5 million in additional Environmental Quality Incentive Program (EQIP) funding to help protect the western Lake Erie basin from Harmful Algal Blooms (HABs) and improve water quality." Cover crops can absorb soluble nutrients like SRP and nitrogen for

plant growth - but not when the field is frozen or snow-covered. Crops in Ohio are dormant in the winter but some people claim cover crops "live" in the winter. In any case, manure applications on frozen ground are more likely to run off and cause environmental problems.

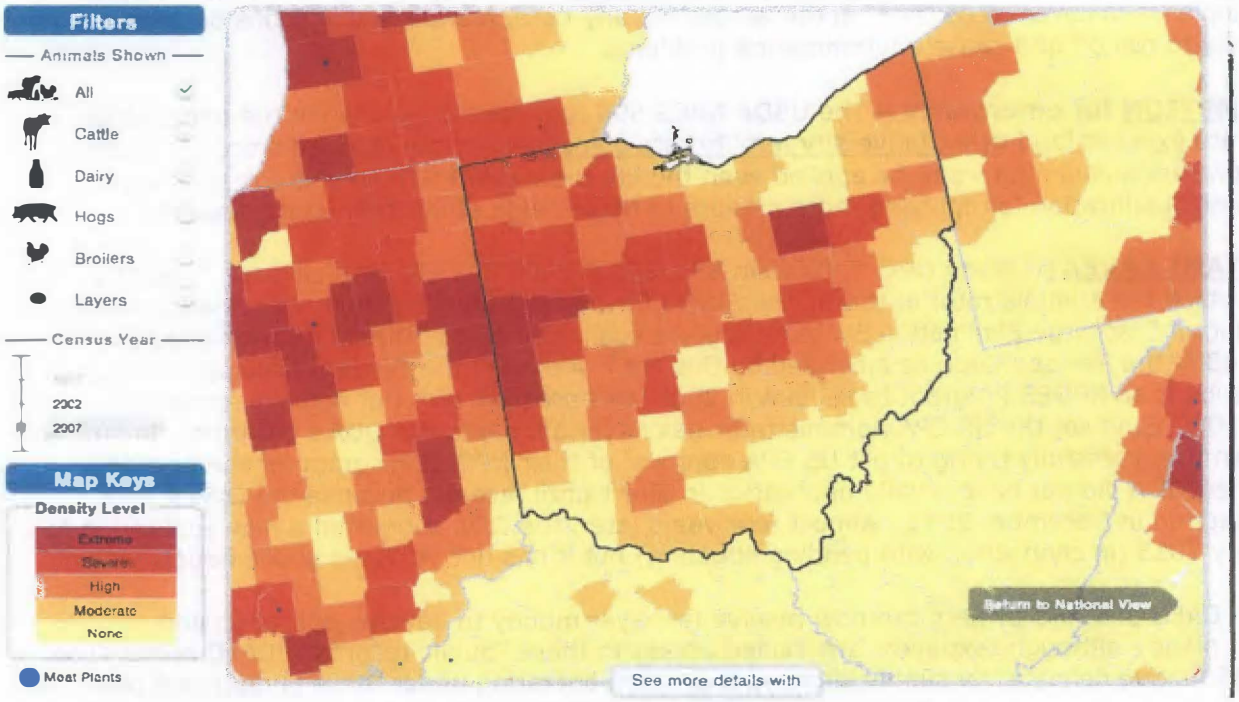
9. 590 EXEMPTION for emergency – The USDA NRCS 590 Standard is used when the phosphorus application rate exceeds land-grant university fertility rate guidelines for the planned crop(s) – in other words, it allows additional manure to be applied even though the current STP level is already high. There is no agronomic justification for applying more manure to these fields other than waste disposal.

10. IMPORTANT CAVEAT - Many ORC statutes in Sec. 903 include the following caveat - "operative on the date on which the Administrator of the United States Environmental Protection Agency approves the National Pollutant Discharge Elimination System program submitted by the Director of Agriculture under section 903.08 of the Revised Code as amended by this act." Although the General Assembly instructed the ODA to submit an NPDES Program to US EPA in 2000, this program was not actually submitted until December 2006. Even so, the US EPA Administrator has never approved the ODA's program. In fact, the ODA has been unsuccessfully trying to get US EPA approval of their NPDES Program for the past 15 years. Further, ODA did not have a valid application in effect until recently because the Ohio's 2006 application expired in December 2011. Almost four years later, the ODA submitted a new application to US EPA in July 2015 (in connection with pending litigation) but it has not yet been public noticed.

SUMMARY - CAFO and AFO owners can now receive taxpayer money to develop operation and management plans - although taxpayers are denied access to these "public records". CAFO owners can assert an "affirmative defense" by simply claiming they were operating under these undisclosed plans. In addition, the ODA director may use the Agricultural pollution abatement fund to pay costs incurred by the ODA...to investigate and mitigate water pollution...caused by...agricultural pollution or [a] discharge of manure specific to AFOs. Why are taxpayers footing the bill for privately-owned CAFOs?

SB 150, SB 1, and HB 64 did not close any of the current ODA manure loopholes. Contrary to propaganda generated by some of our State politicians, these Bills actually created several new ones.

Vickie A. Askins
October 20, 2015



Above is a Food & Water Watch map that shows there is already a very high density of animals in the western Lake Erie basin http://www.factoryfarmmap.org/ . Now that Ohio legislators have shown they are not willing to pass effective legislation to deal with the nutrient runoff threat by CAFOs, many new CAFOs have been announced for the western basin.

Vickie A. Askins
(b) (6)
Cygnet, Ohio (b) (6)
(b) (6)

March 1, 2016

Director David Daniels
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, OH 43068

RE: MSB Dairy Expansion Permit

Dear Director Daniels:

Last week, the Environmental Protection Agency and its Canadian counterpart adopted targets to reduce by 40 percent phosphorus runoff blamed for harmful algal blooms on Lake Erie that contaminated drinking water supplies. While there are many causes, studies over the past several years list agriculture as the primary contributor of excess phosphorus to our rivers and lakes. According to the EPA – "many large [concentrated animal feeding] operations do not have sufficient cropland necessary to properly apply all of the manure as fertilizer and therefore are "a leading contributor of water quality impairment."

That being the case, I would respectfully request you to: I) investigate the failure of your legal department to respond to my recent public records request for a draft of the MSB Dairy permit before the comment period deadline, and II) investigate the false and misleading information in this Permit which you recently approved regarding millions of pounds of phosphorus missing from this Dairy's five-year manure management plan (MMP).

I. Public Records Request - According to O.R.C. 149.43 Availability of public records for inspection and copying. (B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Below is an abbreviated timeline for my request:

December 17, 2015 - I emailed my public records request to your legal department in connection with the December 15th public notice for the MSB Dairy draft expansion permit.

January 12, 2016 - Mr. Schirmer in your legal department finally responded to my request only after I emailed Mr. Miran in your legal department earlier that day questioning the delay. Mr. Schirmer sent the permit CD in the mail after his attempt to email the permit failed.

January 14, 2016 – Deadline for comments - I received a certified mail card in my rural mailbox from ODA. Unfortunately, the Cygnet post office had already closed by the time I got my mail so I did not actually receive my records until after the deadline.

Nevertheless, I submitted the attached ten questions to the ODA legal department before the 5 p.m. deadline based on the MSB Dairy Fact Sheet and this Dairy's previous permits in order to ascertain whether the ODA had resolved serious problems in the past. Please note that no one in your legal department notified me at that time that I had submitted my comments incorrectly.

January 16, 2016 - In response to my January 14 email, Representative Teresa Fedor emailed your legal department questioning the timing of this records failure stating "Not modernizing and responding at the speed of business simply looks like a governmental delay tactic to keep the public out." She requested a meeting to resolve this matter. I spoke with Rep. Fedor last week and she said your legal department never responded.

January 30, 2016 - After I read the public notice in our local newspaper that you had approved this permit, I emailed your legal department asking how you could have approved this permit before someone responded to my public comments.

February 3, 2016 - Mr. Schirmer sent me a letter refuting ODA's duty to respond to my questions and reprimanding me for not emailing them to your DLEP office. I admit I submitted my comments to your legal department and not to your DLEP department. Several years ago, William Hopper - former ODA Chief Counsel, ordered me to submit all future communications exclusively to the legal department and not to send any communications directly to the DLEP office. Although I believe he is no longer in your employ, I felt threatened and have tried to abide by his demand over the years.

Mr. Schirmer did not apologize in his letter for the late records but instead claimed I could have reviewed this permit at the DLEP office – which is 120 miles from my home. He also claimed the documents were "of such size that it is not feasible to send these electronically and in a timely manner for review" and denied my request for an extension. According to a Portage Township Trustee, the ODA sent them a permit CD months earlier. Why then would Mr. Schirmer wait until two days before the deadline to send me a permit CD?

I find it ironic that it took Mr. Schirmer 28 days to send me a permit CD but only three days to send his disparaging letter. I don't think his excuses and critiques would "abide by the spirit of Ohio's Public Records Act."

According to the Ohio Department of Agriculture's Mission Statement in your public records policy - "openness leads to a better informed citizenry, which leads to better government and better public policy. Consistent with the premise that government at all levels exists *first and foremost to serve the interests of the people*, it is the mission and intent of ODA at all times to fully comply with and abide by the spirit of Ohio's Public Records Act." Clearly, this is not the case. If the ODA cannot fill public records requests "within a reasonable period of time" – I urge you to extend the 30-day comment deadline for draft permits so other concerned citizens are not denied the opportunity to provide comments in the future.

II. Insufficient cropland to apply all the manure in the MSB Permit - The MSB Dairy has a history of serious problems with the MMPs in prior permits. Please read the attached copy of my June 2009 letter to your predecessor regarding an earlier public meeting for this Dairy. This letter explains why we did not request another public meeting. I never received a response to my concerns so my attempt to improve this process was futile.

In light of ODA's failure to "fully comply with and abide by the spirit of Ohio's Public Records Act" I would respectfully ask you to review and respond to the following concerns about the missing, outdated and misleading data in the MSB expansion permit you just approved.

1. **QUESTIONABLE DATA** - My attached 2009 letter contains very troubling issues we exposed in the past regarding the engineering firm that developed the MSB expansion permit. According to the Wood County Prosecutor's Office and the Wood County Engineer's Office – there were altered data in another Wood County dairy permit that was developed by this same firm. However, it appears your staff has once again overlooked questionable and incorrect data in this new MMP.

Part 7 of the MMP –

- The ANNUAL MANURE VOLUME CALCULATIONS worksheet shows (b) (6) 1,400 lb. mature dry cows and (b) (6) 1,400 lb. lactating cows – but Column C – Volume of Manure per Animal per day is based on numbers in the OAC Appendix for 1,000 lb. dairy cows.
- The MANURE GENERATION WORKSHEET for the Expansion shows under "a" that these calculations are for 1,000 lb. cows plus the gallons per cow reflect the numbers in the OAC Appendix for a 1,000 lb. dairy cow.

Manure calculations for a 1,400 lb. cow vs. a 1,000 lb. cow results in a huge difference in the total volume of manure when multiplied by (b) (6) dairy cows. Please explain.

2. **CERTIFIED LIVESTOCK MANAGER (CLM)** – MSB Dairy is in the Cedar-Portage Basin which falls in the western Lake Erie basin drainage area. Senate Bill 1 in 2015 contained only one new statute for CAFOs and it was Sec. 903.40 – (A) No person for the purposes of "agricultural production" in the western basin shall apply manure obtained from a CAFF "issued a permit under this chapter" unless the person has been issued:

- (1) a livestock manager certification or
- (2) a fertilizer certification by the ODA Director.

- According to Part 7 – General Information (page 8 of 12) this Dairy is not employing a Certified Livestock Manager plus there was no Form DLEP-3900-012 included with the permit CD.
- According to Part 10 of the MMP (pg. 13 of 18) "Sale/Distribution/Donation of manure to someone other than a Certified Livestock Manager."

It appears that the new ORC 903.40 conflicts with the current ORC 903.07 which only requires a CLM for Major CAFFs. In light of the new CLM regulations – please explain who will be applying the massive amounts of manure generated by this CAFO and why this expanded Dairy in the WLEB will not utilize a Certified Livestock Manager.

3. **PHOSPHORUS PRODUCED BY MSB (fka (b) (6)) DAIRY** –

- The 2005 Farm Nutrient Budget for this Dairy showed 245,000 lbs. P205 for "All Manure" produced by (b) (6) cows or **111.36** lbs. P205 per cow per year.
- The 2008 Farm Nutrient Budget for this Dairy showed 126,275 lbs. P205 for "All Manure" produced by (b) (6) cows or **57.4** lbs. P205 per cow per year.
- The new MMP for this Dairy shows 2,041 lbs. P205 for manure under the control of the facility plus 63,961 lbs. P205 for manure distributed to others thru D&U. This totals only **66,002 lbs**. of manure for (b) (6) cows and equates to **22.3** lbs. P205 per cow per year.

- The attached Appendix to OAC 901:10-2-10 shows a 1,400 lb. lactating dairy cow produces .52 lbs. P205 per day and a 1,400 lb. dry dairy cow produces .15 lb. P205 per day. To do the math for the number of dry and lactating cows based on this Appendix would actually equate to **501,846 lbs**. P205 per year. This equates to **169.54** lbs. of P205 per cow per year.

According to this MMP, the cows in this expanded Dairy would only be producing **13%** of the manure as calculated according to your OAC Appendix. The difference between the OAC Appendix and the MMP equates to an outrageous **435,844 lbs.** of P205 per year that are not accounted for and over **2 million lbs**. of P205 over the five-year duration of this Permit. Kevin Elder has said in the past they do not use "book numbers" – but this is YOUR Appendix in YOUR rules. Please explain.

4. **ACREAGE FOR MANURE APPLICATION** – The approved expansion of the MSB Dairy is extremely troubling because this Dairy would supposedly be spreading massive amounts manure on less than **2,000** acres. However, using the data in the OAC Appendix plus existing soil phosphorus levels would clearly require at least **10,000** acres upon which to agronomically apply the P205 in the manure generated by this CAFO. ODA knows this Dairy has repeatedly submitted MMPs with vastly insufficient manure application acreage over the years. However, once again, ODA has approved another permit with more cows and even less legitimate acreage.

There is no documentation in this Permit for the "approximately 1,800 acres of cropland owned by other farmers" other than the Manure Management Tool that shows Farm A has 474 and 1,326 "Acres Receiving Manure" and that they all "need new soil tests". This MMP contains no laboratory soil tests, no locations for these undocumented fields, and no nutrient budget. How could ODA know whether these undisclosed fields exist and further whether these fields would need more phosphorus without up-to-date soil tests?

This is not the first time the ODA has withheld field-specific information from the public regarding manure application fields. (b) (6) Dairy (nka MSB Dairy) initially tried to withhold the manure field maps from the public by claiming they were a "trade secret" and the ODA agreed. In June of 2006, the Wood County Prosecutor's office sent a letter to the ODA requesting public records for all documentation for "the maps and other information identifying the fields that will be used for manure application in the operation of the dairy."

Linda Holmes, Assistant Prosecuting Attorney, questioned the ODA's withholding of this information and stated their intent to "file a mandamus action seeking the release of those records as public records." She stated that the Health Department had duties under the law to abate nuisances and could not perform these duties if they were denied this information. The ODA was ultimately forced to release the maps although ODA personnel stubbornly refused to re-open the public comment period until after citizens had time to review this newly-released information.

In much the same way, ODA has again allowed MSB Dairy to withhold all identifying documentation for the 1,800 acres of cropland they claim is "owned by other farmers for land application of the manure." There are no soil tests and there is no information identifying the fields that will supposedly be used for manure application. Similar to the "trade secret" debacle, Mr. Schirmer

denied my request to extend the public comment period for this draft permit until after we had "a reasonable period of time" to review the delayed permit CD.

In light of the binational targets to reduce by 40 percent phosphorus runoff blamed for harmful algal blooms on Lake Erie, I would question why your DLEP staff did not recommend that you deny this permit under O.A.C. 901:10-1-03 since it contained false and misleading information. It appears there has been a blatant misrepresentation of facts and a manipulation of data in the original, modified and expansion permits for this Dairy – which suggests serious problems within your DLEP.

I urge you to promptly investigate and respond to these serious allegations as soon as possible.

Respectfully,

Vickie A. Askins

Vickie A. Askins

Attachments

cc: U.S. Senator Sherrod Brown
Governor John Kasich
Rep. Teresa Fedor
Sen. Randy Gardner
Rep. Mike Sheehy
Rep. Tim Brown
Wood County Commissioners
Paul Dobson, Wood County Prosecuting Attorney
Benjamin Batey, Wood County Health District
Dave Housholder, Portage Township Trustees

Table of Rules

The following table contains links to historic versions of Ohio EPA's Permit-to-Install rules.* The Permit-to-Install rules govern the permitting of new sources of air pollution within the State of Ohio. These documents are being provided as a historic reference for any interested party. Each rule can be viewed and downloaded by clicking on the various Prior Effective Dates in the table.

Note, this table does not include currently effective rules. Currently effective rules can be obtained here.

Rule #	Rule Title	Prior Effective Dates
3745-31-01	Definition	AP-9-01, EP-30-01 Jan. 1, 1974 Aug. 15, 1982 Sept. 18, 1987 Nov. 18, 1988 (Emer.) March 9, 1989 (Emer.) June 12, 1989 Oct. 8, 1993 June 1, 1994 April 12, 1996 April 27, 1998 Sept. 25, 1998 Nov. 30, 2001 Nov. 17, 2003 Oct. 28, 2004 Dec. 1, 2006
3745-31-02	Applicability, Requirements and Obligations	AP-9-02, EP-30-02 Jan. 1, 1974 Aug. 15, 1982 Sept. 16, 1987 April 20, 1994 April 12, 1996 April 27, 1998 Oct. 17, 2003 Dec. 1, 2006
3745-31-03	Exemptions	EP-30-03 Jan. 1, 1974 Aug. 15, 1982 Sept. 16, 1987 Aug. 14, 1989 Oct. 8, 1993 June 1, 1994 April 12, 1996 April 27, 1998 Nov. 30, 2001 Oct. 17, 2003 Dec. 1, 2006
3745-31-04	Applications	EP-30-04 Jan. 1, 1974 Aug. 15, 1982 Sept. 16, 1987 Oct. 17, 2003 Dec. 1, 2006

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3745-31-05	Criteria for Decision by the Director	EP-30-05 Jan. 1, 1974 Dec. 7, 1978 Aug. 15, 1982 Nov. 17, 1988 (Emer.) March 9, 1989 (Emer.) June 12, 1989 Oct. 8, 1993 April 20, 1994 Oct. 31, 1994 April 12, 1996 April 27, 1998 Nov. 30, 2001 Oct. 17, 2003 Dec. 1, 2006
3745-31-06	Completeness Determinations, Processing Requirements, Public Participation, Public notice and Issuance	EP-30-06 Jan. 1, 1974 Aug. 15, 1982 Sept. 16, 1987 Oct. 17, 2003 Dec. 1, 2006
3745-31-07	Termination, Revocation, Expiration, Renewal, Revision and Transfer	EP-30-07 Jan. 1, 1974 Aug. 15, 1982 Nov. 30, 2001 Oct. 17, 2003 Dec. 1, 2006
3745-31-08	Registration Status Permit-to-Operate	EP-30-08 Jan. 1, 1974 Aug. 15, 1982 Oct. 17, 2003 Dec. 1, 2006
3745-31-09	Variances on Operation	April 12, 1996 Oct. 28, 2004 Dec. 1, 2006
3745-31-10	NSR Projects at Existing Emissions Units at a Major Stationary Source	April 12, 1996 Oct. 28, 2004 Dec. 1, 2006
3745-31-11	Attainment Provisions - Ambient Air Increments, Ceilings and Classifications	April 12, 1996
3745-31-12	Attainment Provisions - Data Submission Requirements	April 12, 1996
3745-31-13	Attainment Provisions - Review of Major Stationary Sources and Major Modifications, Stationary Source Applicability and Exemptions	April 12, 1996 Oct. 28, 2004
3745-31-14	Attainment Provisions - Pre-application analysis	April 12, 1996
3745-31-15	Attainment Provisions - Control Technology Review	April 12, 1996 Oct. 28, 2004
3745-31-16	Attainment Provisions - Major Stationary Source Impact Analysis	April 12, 1996
3745-31-17	Attainment Provisions - Additional Impact Analysis	April 12, 1996
3745-31-18	Attainment Provisions - Air Quality Models	April 12, 1996
3745-31-19	Attainment Provisions - Notice to the United States Environmental Protection Agency	April 12, 1996
3745-31-20	Attainment Provisions - Innovative Control Technology	April 12, 1996 Dec. 1, 2006
3745-31-21	Nonattainment Provisions - Review of Major Stationary Sources and Major Modifications Stationary Source Applicability and Exemptions	April 12, 1996 April 27, 1998 Oct. 28, 2004
745-31-22	Nonattainment Provisions - Conditions for Approval	April 12, 1996 Oct. 28, 2004 Dec. 1, 2006
3745-31-23		April 12, 1996

	Nonattainment Provisions - Stationary Sources Locating in Designated Clean or Unclassifiable Areas Which Would Cause or Contribute to a Violation of a National Ambient Air Quality Standard	
745-31-24	Nonattainment Provisions - Baseline for Determining Credit for Emission and Air Quality Offsets	April 12, 1996 Oct. 28, 2004
3745-31-25	Nonattainment Provisions - Location of Offsetting Emissions	April 12, 1996
3745-31-26	Nonattainment Provisions - Offset Ratio Requirements	April 12, 1996 Oct. 28, 2004
3745-31-27	Nonattainment Provisions - Administrative Procedures for Emissions Offsets	April 12, 1996
3745-31-28	Review of Major Stationary Sources of Hazardous Air Pollutants Requiring MACT Determinations	Sept. 25, 1998
3745-31-29	General Permit-to-Install and General PTIO	Oct. 17, 2003 Dec. 1, 2006
3745-31-30	Reserved	Oct. 28, 2004 Dec. 1, 2006
3745-31-31	Reserved	Oct. 28, 2004 Dec. 1, 2006
3745-31-32	Plantwide Applicability Limit	Oct. 28, 2004 Dec. 1, 2006
3745-31-33	Site Preparation Activities Prior to Obtaining a Final Permit-to-Install or PTIO	Dec. 1, 2006

*Please note that although every effort was made to ensure the above information is accurate, Ohio EPA provides no guarantee that the information is correct. Please notify Paul Braun at paul.braun@epa.state.oh.us concerning any errors on this page.

Return to Main DAPC Rules Page.

Division of Air Pollution Control
Phone: (614) 644-2270 ~ Fax: (614) 644-3681 ~ Contact Us ~ Contact E-Check

Mailing Address: P.O. Box 1049, Columbus, OH 43216-1049
Street Address: 50 West Town Street, Suite 700, Columbus, OH 43215
Report a Spill, Release or Environmental Crime
(800) 282-9378 or (614) 224-0946

ODA submitted a program to the U.S. EPA that complied with federal requirements and approval is obtained from the U.S. EPA. Ohio Rev. Code § 903.08(A). The General Assembly conditioned the transfer and ODA's authority to administer the NPDES program on or after the date the U.S. EPA approved the program. Ohio Rev.Code § 903.08(B); *Elder Aff.* at ¶ 11, (R. 17-10), Page ID# 530.

The enactment of this comprehensive environmental statute to create a regulatory program for CAFFs and CAFOs administered by ODA is an example of the State of Ohio exercising its power and authority to adopt and enforce statewide requirements to control water pollution within the State as recognized under the Clean Water Act and federal regulations.

3. **There is no federal equivalent to ODA's PTI and PTO program under the Clean Water Act.**

ODA's State permit program is not subject to the requirements of Clean Water Act or federal NPDES regulations because no PTI or PTO program exists under the Act. *Elder Aff.* at ¶10, (R. 17-10), Page ID# 530; *see also* 33 U.S.C. § 1342(b), 40 C.F.R. Part 123. ODA's PTIs and PTOs are not federally enforceable under the Act's § 402 NPDES permitting scheme because PTIs and PTOs do not regulate actual point source discharges of pollutants from CAFOs. *Id.* at ¶¶8-9, (R.17-10), Page ID# 529.

Also, the Clean Water Act does not regulate the design, construction,

operation, or maintenance of CAFOs. Rather, it regulates actual pollutant discharges from CAFOs. *Nat'l Pork Producers Council v. U.S. EPA.*, 635 F.3d 738, 750-751, (2011). Any attempt to regulate the construction or operation of a CAFO with an NPDES permit is *ultra vires* and beyond the regulatory scope of the NPDES program. *Id.* at 751.[5]

Since 2002, ODA has issued approximately 139 PTIs and 387 PTOs and PTO renewals to CAFFs as authorized by Ohio Rev.Code Chapter 903 and Ohio Adm. Code Chapter 901:10. *Elder Aff.* at ¶¶8-9, (R. 17-10), Page ID# 529-530. ODA has never issued an NPDES permit to a CAFF during its administration of the State program.

4. The Askins mistakenly conflate the different regulatory programs administered by Ohio EPA and ODA for livestock operations.

The Askins make several allegations regarding the manure management plans and permitting requirements of the Ohio EPA and ODA, which indicate that they may not understand how large livestock operations are regulated in the State of Ohio.

[5] The 2008 federal CAFO Rule required CAFOs to apply for an NPDES permit if the CAFO discharged or "proposed to discharge". Under 40 C.F.R. § 122.23(d) (2012 version), the term "proposed to discharge" meant the CAFO was designed, constructed, operated, or maintained such that a discharge will occur."

In accordance with the decision in the *National Pork Producers* case, the U.S. EPA amended 40 C.F.R. §122.23(d), which currently states as follows: (d) *NPDES permit authorization.*—(1) *Permit Requirement.* A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

Ohio EPA
Ohio Environmental Protection Agency

NPDES general permits currently available

Answer ID 180 | This answer was first published on: 11/29/2005 12:35 PM | This answer was last updated on: 03/04/2010 02:40 PM

What type of general NPDES permits are currently available?

General NPDES permits have been issued by Ohio EPA and are available for the following categories:

- Coal Surface Mining Activities
- Concentrated Animal Feeding Operations (CAFOs)
- Construction Site Storm Water
- Construction Site Storm Water in the Big Darby Creek Watershed
- Construction Site Storm Water in the Olentangy River Watershed
- Household Sewage Treatment Systems
- Hydrostatic Test Water
- Industrial Storm Water
- Non-contact Cooling Water
- Petroleum Bulk Storage Facilities
- Petroleum-related Corrective Actions
- Small MS4 Storm Water
- Small Sanitary Discharges
- Small Sanitary Discharges That Cannot Meet BADCT Standards
- Storm Water Discharges Associated with Industrial Activity From Marinas
- Temporary Wastewater Discharges
- Water Treatment Plants

Over the next several years, a number of other categories of discharges will be addressed by general permits, giving dischargers the opportunity to choose between an individual or general permit. These potential categories include water treatment plant discharges, industrial mineral mining activity discharges (including sand and gravel operations) and discharges from landfills. For more information and to download permits, visit the Division of Surface Water's Web page.

No one in Ohio is has the authority to inforce the CWA for CAFO

ODA has not been granted the right to inforce the CWA for CAFO

Please read and give me a call to discuss the problems with the CWA for CAFO

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Code of Federal Regulations

Title 40 - Protection of Environment

Volume: 21
Date: 2009-07-01
Original Date: 2009-07-01
Title: Section 122.23 - Concentrated animal feeding operations (applicable to State NPDES programs, see Â§ 123.25).
Context: Title 40 - Protection of Environment. CHAPTER I - ENVIRONMENTAL PROTECTION AGENCY (CONTINUED). SUBCHAPTER D - WATER PROGRAMS. PART 122 - EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM. Subpart B - Permit Application and Special NPDES Program Requirements.

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

(a) *Scope.* Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) *Animal feeding operation* ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) *Concentrated animal feeding operation* ("CAFO") means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term *land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) *Large concentrated animal feeding operation* ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or

(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term *manure* is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) *Medium concentrated animal feeding operation* ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;

(B) 300 to 999 veal calves;

(C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(D) 750 to 2,499 swine each weighing 55 pounds or more;

(E) 3,000 to 9,999 swine each weighing less than 55 pounds;

(F) 150 to 499 horses;

(G) 3,000 to 9,999 sheep or lambs;

(H) 16,500 to 54,999 turkeys;

(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or

(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) *Small concentrated animal feeding operation* ("Small CAFO"). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) *How may an AFO be designated as a CAFO?* The appropriate authority (*i.e.*, State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) *Who may designate?*—(i) *Approved States.* In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

(ii) *States with no approved program.* The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the

facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) *Who must seek coverage under an NPDES permit?*—(1) *Permit requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

(2) *Information to submit with permit application or notice of intent.* An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(3) *Information to submit with permit application.* A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) *Land application discharges from a CAFO are subject to NPDES requirements.* The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) *When must the owner or operator of a CAFO seek coverage under an NPDES permit?* Any CAFO that is required to seek permit coverage under paragraph (d)(1) of this section must seek coverage when the CAFO proposes to discharge, unless a later deadline is specified below.

(1) *Operations defined as CAFOs prior to April 14, 2003.* For operations defined as CAFOs under regulations that were in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (g) of this section.

(2) *Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date.* For all operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by February 27, 2009.

(3) *Operations that become defined as CAFOs after April 14, 2003, but which are not new sources.* For a newly constructed CAFO and for an AFO that makes changes to its operations that result in its becoming defined as a CAFO for the first time after April 14, 2003, but is not a new source, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

(i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the

time CAFO commences operation;

(ii) For other operations (*e.g.* , resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; or

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until February 27, 2009, or 90 days after becoming defined as a CAFO, whichever is later.

(4) *New sources.* The owner or operator of a new source must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.

(5) *Operations that are designated as CAFOs.* For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.

(g) *Duty to maintain permit coverage.* No later than 180 days before the expiration of the permit, or as provided by the Director, any permitted CAFO must submit an application to renew its permit, in accordance with § 122.21(d), unless the CAFO will not discharge or propose to discharge upon expiration of the permit.

(h) *Procedures for CAFOs seeking coverage under a general permit.* (1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) *For EPA-issued permits only.* The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

(i) *No discharge certification option.* (1) The owner or operator of a CAFO that meets the eligibility criteria in paragraph (i)(2) of this section may certify to the Director that the CAFO does not discharge or propose to discharge. A CAFO owner or operator who certifies that the CAFO does not discharge or propose to discharge is not required to seek coverage under an NPDES permit pursuant to paragraph (d)(1) of this section, provided that the CAFO is designed, constructed, operated, and maintained in

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accordance with the requirements of paragraphs (i)(2) and (3) of this section, and subject to the limitations in paragraph (i)(4) of this section.

(2) *Eligibility criteria.* In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge, as follows:

(i) The CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. The CAFO must maintain documentation that demonstrates that:

(A) Any open manure storage structures are designed, constructed, operated, and maintained to achieve no discharge based on a technical evaluation in accordance with the elements of the technical evaluation set forth in 40 CFR 412.46(a)(1)(i) through (viii);

(B) Any part of the CAFO's production area that is not addressed by paragraph (i)(2)(i)(A) of this section is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, or process wastewater; and

(C) The CAFO implements the additional measures set forth in 40 CFR 412.37(a) and (b);

(ii) The CAFO has developed and is implementing an up-to-date nutrient management plan to ensure no discharge from the CAFO, including from all land application areas under the control of the CAFO, that addresses, at a minimum, the following:

(A) The elements of § 122.42(e)(1)(i) through (ix) and 40 CFR 412.37(c); and

(B) All site-specific operation and maintenance practices necessary to ensure no discharge, including any practices or conditions established by a technical evaluation pursuant to paragraph (i)(2)(i)(A) of this section; and

(iii) The CAFO must maintain documentation required by this paragraph either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(3) *Submission to the Director.* In order to certify that a CAFO does not discharge or propose to discharge, the CAFO owner or operator must complete and submit to the Director, by certified mail or equivalent method of documentation, a certification that includes, at a minimum, the following information:

(i) The legal name, address and phone number of the CAFO owner or operator (see § 122.21(b));

(ii) The CAFO name and address, the county name and the latitude and longitude where the CAFO is located;

(iii) A statement that describes the basis for the CAFO's certification that it satisfies the eligibility requirements identified in paragraph (i)(2) of this section; and

(iv) The following certification statement: "I certify under penalty of law that I am the owner or operator of a concentrated animal feeding operation (CAFO), identified as [Name of CAFO], and that said CAFO meets the requirements of 40 CFR 122.23(i). I have read and understand the eligibility requirements of 40 CFR 122.23(i)(2) for certifying that a CAFO does not discharge or propose to discharge and further certify that this CAFO satisfies the eligibility requirements. As part of this certification, I am including the information required by 40 CFR 122.23(i)(3). I also understand the conditions set forth in 40 CFR 122.23 (i)(4), (5) and (6) regarding loss and withdrawal of certification. I certify under penalty of law that this document and all other documents required for this certification were prepared under my direction or supervision and that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons directly involved in gathering and evaluating the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."; and

(v) The certification must be signed in accordance with the signatory requirements of 40 CFR 122.22.

(4) *Term of certification.* A certification that meets the requirements of paragraphs (i)(2) and (i)(3) of this section shall become effective on the date it is submitted, unless the Director establishes an effective date of up to 30 days after the date of submission. Certification will remain in effect for five years or until the certification is no longer valid or is withdrawn, whichever occurs first. A certification is no longer valid when a discharge has occurred or when the CAFO ceases to meet the eligibility criteria in paragraph (i)(2) of this section.

(5) *Withdrawal of certification.* (i) At any time, a CAFO may withdraw its certification by notifying the Director by certified mail or equivalent method of documentation. A certification is withdrawn on the date the notification is submitted to the Director. The CAFO does not need to specify any reason for the withdrawal in its notification to the Director.

(ii) If a certification becomes invalid in accordance with paragraph (i)(4) of this section, the CAFO must withdraw its certification within three days of the date on which the CAFO becomes aware that the certification is invalid. Once a CAFO's certification is no longer valid, the CAFO is subject to the requirement in paragraph (d)(1) of this section to seek permit coverage if it discharges or proposes to discharge.

(6) *Recertification.* A previously certified CAFO that does not discharge or propose to discharge may recertify in accordance with paragraph (i) of this section, except that where the CAFO has discharged, the CAFO may only recertify if the following additional conditions are met:

(i) The CAFO had a valid certification at the time of the discharge;

(ii) The owner or operator satisfies the eligibility criteria of paragraph (i)(2) of this section, including any necessary modifications to the CAFO's design, construction, operation, and/or maintenance to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future;

(iii) The CAFO has not previously recertified after a discharge from the same cause;

(iv) The owner or operator submits to the Director for review the following documentation: a description of the discharge, including the date, time, cause, duration, and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address the cause of the discharge in addition to submitting a certification in accordance with paragraph (i)(3) of this section; and

(v) Notwithstanding paragraph (i)(4) of this section, a recertification that meets the requirements of paragraphs (i)(6)(iii) and (i)(6)(iv) of this section shall only become effective 30 days from the date of submission of the recertification documentation.

(j) *Effect of certification.* (1) An unpermitted CAFO certified in accordance with paragraph (i) of this section is presumed not to propose to discharge. If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to paragraphs (d)(1) and (f) of this section, with respect to that discharge. In all instances, the discharge of a pollutant without a permit is a violation of the Clean Water Act section 301(a) prohibition against unauthorized discharges from point sources.

(2) In any enforcement proceeding for failure to seek permit coverage under paragraphs (d)(1) or (f) of this section that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge when the CAFO either did not submit certification documentation as provided in paragraph (i)(3) or (i)(6)(iv) of this section within at least five years prior to the discharge, or withdrew its certification in accordance with paragraph (i)(5) of this section. Design, construction, operation, and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden.

[68 FR 7265, Feb. 12, 2003, as amended at 71 FR 6984, Feb. 10, 2006; 72 FR 40250, July 24, 2007; 73 FR 70480, Nov. 20, 2008]

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§ 123.63 Criteria for withdrawal of State programs.

(a) In the case of a sewage sludge management program, references in this section to "this part" will be deemed to refer to 40 CFR part 501. The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.24 (or, in the case of a sewage sludge management program, § 501.14 of this chapter).

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.

(6) Where a Great Lakes State or Tribe (as defined in 40 CFR 132.2) fails to adequately incorporate the NPDES permitting implementation procedures promulgated by the State, Tribe, or EPA pursuant to 40 CFR part 132 into individual permits.

(b) [Reserved]

[48 FR 14178, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 54 FR 23897, June 2, 1989; 60 FR 15386, Mar. 23, 1995; 63 FR 45123, Aug. 24, 1998]

33 U.S. CODE § 1341 - CERTIFICATION

Current through Pub. L. 113-65. (See Public Laws for the current Congress.)

US Code Notes Updates Authorities (CFR)

(a) Compliance with applicable requirements; application; procedures; license suspension

(1)Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2)Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the

1.0 Introduction

This document is the application submitted by Governor John J. Gilligan for authority to administer the National Pollution Discharge Elimination System (NPDES) in the State of Ohio. The application is made to the Administrator of the United States Environmental Protection Agency (U.S. EPA) through the Regional Administrator, Region V, U.S. EPA. When the application is approved, the Ohio Environmental Protection Agency (Ohio EPA) will be solely responsible for issuing NPDES permits to almost all point source dischargers to waters of the state, the exception being federal facilities discharging to waters of the state.

The NPDES program was created by the Federal Water Pollution Control Act, 1972, FWPCA, 1972. Its final goal is to eliminate the discharge of pollutants into navigable waters by 1985. The mechanism for controlling point source dischargers in order to meet this goal is the NPDES discharge permit. After December 31, 1974, this permit will be required of every point source discharger as defined by Ohio EPA regulations EP-31-02, Appendix 3.4. When an applicant receives an NPDES discharge permit, he is given the conditions under which he must operate in order to discharge to waters of the state. A permit will specify the amount of pollutants that may be discharged, the monitoring and reporting that must be made about the discharge, and, if necessary, a schedule for constructing the facilities necessary to control the pollutants in the discharge. Through the renewal process, every point source will be taken through a number of steps that are necessary in order to meet the 1985 goal.

Section 402(b) of the FWPCA, 1972, allows the Administrator of U.S. EPA to delegate the authority to administer the NPDES program. Before the authority can be delegated, the Ohio EPA must demonstrate that it meets the necessary requirements. These requirements are contained in Section 402(b) of the FWPCA, 1972, and in regulations 40 CFR 124 et. seq.

This document is written to meet these legal requirements. It is composed of two sections. One section is the program description. This section details how the Ohio EPA will administer the NPDES program. It includes descriptions of the Ohio EPA organization, the permit procedures, and resources devoted to the permit program. Two important parts of this section are the Ohio NPDES regulations and the Memorandum of Agreement between U.S. EPA and Ohio EPA. The regulations detail how the NPDES permits will be written. The Memorandum of Agreement details the responsibilities of the Ohio EPA and U.S. EPA in the NPDES program.

The second section of the document is the Attorney General's statement. This statement certifies the Ohio EPA as having sufficient legal authority and satisfactory regulations in order to administer the NPDES program within federal requirements. It further certifies that no person issuing NPDES permits is subject to a conflict of interest as defined by federal regulations.

2.2 Organization and Structure of the Ohio EPA

The Ohio Environmental Protection Agency is a cabinet-level department whose Director is appointed by the Governor with consent of the Senate. It began operations on October 23, 1972, with personnel transferred from the Ohio Water Pollution Control Board, Ohio Air Pollution Control Board, Ohio Department of Natural Resources and the Ohio Department of Health. Since October, the Agency has grown and its statutory authority revised to meet the requirements of the NPDES program. Under existing law, the Ohio Environmental Protection Agency is responsible for all environmental protection programs of the state. It has sole state authority to administer the NPDES program.

To carry out the Agency's environmental programs, the organization has a functional structure. Most of the burden for the permit program is borne by the Divisions of Surveillance and Waste Management and Engineering. Other important functions are performed by the Divisions of Planning, Data and Systems, and Litigation and NPDES Permit Records. The organization chart, 2.2.2, shows the relationships of the various Divisions.

Division of Waste Management and Engineering

The Division operates through four district offices with central office coordination. Personnel of this Division are responsible for determining the time needed for compliance with permit effluent limitations. When a plan is developed for dealing with the wastewater discharge, this Division is responsible for plan approval. Once the facility is operating, they are responsible for inspecting the facilities to insure proper operation and maintenance. The district offices have primary responsibility for establishing the compliance schedules, approving plans, and inspecting facilities. The central office coordinates district operations and reviews proposed permits for consistency with policy.

Division of Surveillance

This Division operates through four district offices with central office coordination and technical support. The determination of allowable levels of pollutant discharge from a point source is one of the Division's responsibilities. Through a self-monitoring and field sampling program, the Division polices compliance with permit effluent limitations. To measure the effectiveness of the permit program, a water quality sampling program is carried out. The district offices are primarily responsible for determining permit conditions and following up on compliance monitoring. The central office develops the methods for surveillance, coordinates district activities and supports district operations.

Division of Planning

This Division's primary concern is with the long-term effects of a permit and consistency of permits with water quality basin plans.

final requirements.

(4) Possession of an Ohio NPDES Permit shall not relieve any person of the responsibility to comply with the authorized discharge levels specified in the permit or other provisions of applicable law.

(5) If a point source is constructed or should have been constructed pursuant to a Permit to Install under Chapter EP-30 of Ohio EPA Regulations and does not meet authorized discharge levels, the point source may be granted an Ohio NPDES Permit with a satisfactory schedule of compliance which shall become a condition of the permit. Such a permit must require the discharge to come into compliance with authorized discharge levels at the earliest possible date but no later than one year from the date of issuance. If such a discharge is not in compliance with authorized discharge levels at that time, the discharge shall be terminated until it comes into compliance.

(B) Authorized Discharge Levels.

(1) Final Limitations.

(a) Except as provided by paragraph (3), for each point source from which pollutants are discharged, the Director shall determine and specify in the permit the maximum levels of pollutants that may be discharged to insure compliance with

(i) applicable water quality standards, and

(ii) applicable effluent limitations, which shall be the national effluent limitations and guidelines adopted by the Administrator pursuant to Sections 301 and 302 of the Act, and national standards of performance for new sources pursuant to Section

current maximum levels of discharge, even where limitations to such discharge levels is not essential to avoid violation of either applicable water quality standards or effluent standards.

(4) Characterization of Discharge Levels. Authorized levels of pollutants that may be discharged shall be stated to the extent possible given the nature of the pollutant in terms of the volume, weight in pounds per day (except for those pollutants not expressible by weight), duration, frequency, and where appropriate, concentration of each pollutant discharge. The Director shall specify average and maximum daily quantitative limitations.

(C) Time for Issuance.

The Director shall issue or deny an application for a permit for a new discharge for the installation or modification of a disposal system, or for renewal of a permit, within 180 days of the date on which he receives a complete application with all plans, specifications, construction schedules, and other pertinent information required by the Director.

(D) Renewal of Permits.

(1) The Director shall notify the permittee that any permittee who wishes to continue to discharge after the expiration date of his Ohio NPDES permit must file for reissuance of the permit at least 180 days prior to its expiration. Except as provided by paragraph (2), Ohio NPDES permits shall be renewed in accordance with the provisions for issuance of permits under this Chapter EP-31, of the Ohio EPA Regulations.

(2) A permit shall not be renewed unless the Director determines that the permittee is making satisfactory progress toward the achievement of all applicable limitations and has complied with the terms and conditions

of the existing permit.

(3) Any point source the construction of which is commenced after the date of enactment of the Act and which is so constructed to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a 10 year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purpose of Section 167 or 169 (or both) of the Internal Revenue Code of 1954 whichever period ends first.

§ 123.24 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1)(i) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). If existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

Note:
For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.

(ii) Where a State has been authorized by EPA to issue permits in accordance with § 123.23(b) on the Federal Indian reservation of the Indian Tribe seeking program approval, provisions describing how the transfer of pending permit applications, permits, and any other information relevant to the program operation not already in the possession of the Indian Tribe (support files for permit issuance, compliance reports, etc.) will be accomplished.

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of § 123.43.

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs. (See § 124.4.)

Note:
To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to consider steps to coordinate or consolidate their own permit programs and activities.

(6) Provisions for modification of the Memorandum of Agreement in accordance with this part.

(c) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of

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40 CFR 123.62 - Procedures for revision of State programs.

CFR (/cfr/text/40/123.62?qt-cfr_tabs=0#qt-cfr_tabs)

Updates (/cfr/text/40/123.62?qt-cfr_tabs=1#qt-cfr_tabs)

Authorities (U.S. Code) (/cfr/text/40/123.62?qt-cfr_tabs=2#qt-cfr_tabs)

prev (/cfr/text/40/123.61) | next (/cfr/text/40/123.63)

§ 123.62Procedures for revision of State programs.

(a) Either EPA or the approved State may initiate program revision. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities. Grounds for program revision include cases where a State's existing approved program includes authority to issue NPDES permits for activities on a Federal Indian reservation and an Indian Tribe has subsequently been approved for assumption of the NPDES program under 40 CFR part 123 (/cfr/text/40/123) extending to those lands.

(b) Revision of a State program shall be accomplished as follows:

(1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the *Federal Register* and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.

(3) The Administrator will approve or disapprove program revisions based on the requirements of this part (or, in the case of a sewage sludge management program, 40 CFR part 501 (/cfr/text/40/501)) and of the CWA.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the *Federal Register*. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs must notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and must identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under § 123.22(b) (/cfr/text/40/123.22#b) (or, in the case of a sewage sludge management program, § 501.12(b) (/cfr/text/40/501.12#b) of this chapter) must be revised and resubmitted.

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§ 123.25 Requirements for permitting.

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.4—(Prohibitions):

(2) § 122.5(a) and (b)—(Effect of permit);

(3) § 122.7(b) and (c)—(Confidential information);

(4) § 122.21 (a)-(b), (c)(2), (e)-(k), (m)-(p), (q), and (r)—(Application for a permit);

(5) § 122.22—(Signatories);

(6) § 122.23—(Concentrated animal feeding operations);

(7) § 122.24—(Concentrated aquatic animal production facilities);

(8) § 122.25—(Aquaculture projects);

(9) § 122.26—(Storm water discharges);

(10) § 122.27—(Silviculture);

(11) § 122.28—(General permits), *Provided* that States which do not seek to implement the general permit program under § 122.28 need not do so.

(12) Section 122.41 (a)(1) and (b) through (n)—(Applicable permit conditions) (Indian Tribes can satisfy enforcement authority requirements under § 123.34);

(13) § 122.42—(Conditions applicable to specified categories of permits);

(14) § 122.43—(Establishing permit conditions);

(15) § 122.44—(Establishing NPDES permit conditions);

(16) § 122.45—(Calculating permit conditions);

(17) § 122.46—(Duration);

(18) § 122.47(a)—(Schedules of compliance);

(19) § 122.48—(Monitoring requirements);

(20) § 122.50—(Disposal into wells);

(21) § 122.61—(Permit transfer);

(22) § 122.62—(Permit modification);

(23) § 122.64—(Permit termination);

(24) § 124.3(a)—(Application for a permit);

(25) § 124.5 (a), (c), (d), and (f)—(Modification of permits);

(26) § 124.6 (a), (c), (d), and (e)—(Draft permit);

(27) § 124.8—(Fact sheets);

(28) § 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e)—(Public notice);

(29) § 124.11—(Public comments and requests for hearings);

(30) § 124.12(a)—(Public hearings); and

(31) § 124.17 (a) and (c)—(Response to comments);

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 22 2013

REPLY TO THE ATTENTION OF:

WN-16J

(b) (6)

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Re: Freedom of Information Act Request
EPA-R5-2014-000825

Dear Mrs. Askins:

This letter responds to your Freedom of Information Act (FOIA) request dated November 3, 2013. You requested from the U.S. Environmental Protection Agency copies all approved/signed Memorandums of Agreement (MOAs) between the State of Ohio and EPA on behalf of the Ohio Department of Agriculture and the Ohio EPA. EPA's response to your request is due on December 4, 2013. This is the Water Division, National Pollutant Discharge Elimination System (NPDES) Programs Branch's response to your FOIA request.

Responsive records from the Water Division, NPDES Programs Branch, have been uploaded into FOIA online and a link to those documents will be provided to you by the FOIA office. Enclosure A is an itemized list of the responsive records. All responsive records are signed MOAs between EPA and Ohio EPA. The Water Division has no signed MOAs between EPA and the Ohio Department of Agriculture.

The cost of responding to your request was less than $14; therefore, there is no fee for this response.

You may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, D.C. 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, email: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, D.C. 20004. Your appeal must be made in writing and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the request number EPA-R5-2014-000825. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

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Ohio | Department of Agriculture

Governor Ted Strickland • Lt. Governor Lee Fisher
Director Robert J. Boggs

Ohio EPA

State of Ohio Environmental Protection Agency
Governor Ted Strickland • Lt. Governor Lee Fisher
Director Christopher Korleski

August 7, 2009

Bill Harris, President of the Ohio Senate
Statehouse
Room #201, Second Floor
Columbus, Ohio 43215

Armond Budish, Speaker
Ohio House of Representatives
77 S. High St
14th Floor
Columbus, OH 43215-6111

Dear President Harris and Speaker Budish:

We are writing to you in an effort to resolve an ongoing dilemma we have in Ohio. As you may recall, legislation was passed in January of 2000 authorizing the Ohio Department of Agriculture (ODA) to begin regulating large and/or concentrated animal feeding operations (CAFOs). In August, 2002 ODA had staff and final rules in place and began implementing the permit to install and permit to operate portion of the program. The 2000 legislation also provided ODA with the statutory framework to implement the National Pollutant Discharge Elimination System (NPDES) permit program in accordance with the Clean Water Act, contingent upon the U. S. Environmental Protection Agency authorizing ODA to administer the CAFO NPDES program.

In an ongoing effort to obtain authorization from the U.S. EPA, changes to the Ohio Revised and Administrative Codes have been made several times over the past several years. Last autumn, U.S.EPA public noticed Ohio's application to transfer administration of the CAFO NPDES permit program from Ohio EPA to ODA, stating that "U.S. EPA considers the application approvable provided that the state adopts the specified statutory and regulatory changes." The regulatory changes have been adopted by ODA, but the specified statutory changes (introduced in S.B. 383) did not get passed in the lame duck session last year as hoped.

U.S. EPA finalized new federal rules for the CAFO NPDES program in late November, 2008. As part of that rule, states are required to make statutory changes by December 2010, or make rule changes by December 2009, if changes are necessary to implement the program in conformance with the new federal rule. We had hoped that well before those deadlines, a decision would have been made on the application to allow ODA to

administer the program. At this time, U.S. EPA has indicated that since Ohio EPA still has the authorized CAFO NPDES program, their expectation is that Ohio EPA will begin making the necessary rule changes. U.S. EPA also noted that they "would not have a basis to approve the transfer to ODA after December 2009 if the 2008 CAFO regulations have not been incorporated into ODA's program as required by 40 CFR 123.62(e)."

We need action to resolve this situation very soon. One option would be to get the specified statutory changes adopted as quickly as possible so that ODA will be authorized to administer the program before the December 2009 deadline. The other alternative is to eliminate the transfer provisions in the statute so that Ohio EPA retains the NPDES program for CAFOs and can move forward with adopting the necessary rules to conform to the new federal CAFO requirements. If it is not determined soon which agency will administer the program after December 2009, both agencies will be using resources trying to stay in compliance with federal and state requirements. Obviously that is not an ideal situation given our current financial constrains.

In the very near future we will be contacting your respective chiefs of staff to set up meetings to discuss this matter in person.

If you have any questions or would like additional information please let us know.

Sincerely,

Robert J. Boggs
Director, ODA

Chris Korleski
Director, Ohio EPA

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State of Ohio Environmental Protection Agency

STREET ADDRESS:
Lazarus Government Center
50 W. Town St., Suite 700
Columbus, Ohio 43215

TELE: (614) 644-3020 FAX: (614) 644-3184
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MAILING ADDRESS:
P.O. Box 1049
Columbus, OH 43216-1049

June 17, 2010

Vickie Askins
(b) (6)
Cygnet, Ohio 43413

Re: (b) (6) Jersey Dairy Manure Fields in Water Source Protection Areas

Dear Vickie,

I am writing in response to your letter of June 2, 2010; regarding the proposed (b) (6) Jersey Dairy. As you are aware, Ohio EPA is not the regulatory agency responsible for issuing installation and operating permits for large Concentrated Animal Feeding Facilities (CAFFs). This duty was delegated to the Ohio Department of Agriculture by the Ohio House of Representatives and the Ohio Senate. Ohio EPA's current regulatory responsibility for Concentrated Animal Feeding Operations (CAFOs) is to issue National Pollutant Discharge Elimination System (NPDES) permits to CAFOs which discharge or propose to discharge pollutants.

Ohio EPA does not have rules regarding land application restrictions for manure produced and land-applied by CAFOs. The land application restrictions you have referenced are permit conditions in CAFO NPDES permits. These permit conditions are not enforceable outside of an effective CAFO NPDES permit.

We do not have an application pending for a CAFO NPDES permit for this facility. In addition, on June 3, 2010, a complaint for judicial foreclosure of the (b) (6) Jersey Dairy Leasing, LLC properties in Wood County was filed in the United States District Court Northern District of Ohio Western Division.

In light of this judicial foreclosure complaint, Ohio EPA's limited regulatory authority for CAFOs, and Ohio EPA's resources, I do not believe that an Ohio EPA review of the (b) (6) r Jersey Dairy Manure Management Plan (MMP) is either practical or necessary at this time. If the situation changes and the dairy is constructed and discharges or proposes to discharge, then Ohio EPA would be more than willing to conduct that review.

If you have questions regarding the Source Water Assessment and Protection Program administered by Ohio EPA's Division of Drinking and Ground Waters, your questions can be answered more quickly by directly contacting Michael Eggert at 614-644-2767 or at michael.eggert@epa.state.oh.us.

Ohio | Department of Agriculture
Governor Ted Strickland • Lt. Governor Lee Fisher
Director Robert J. Boggs

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Administrative Office
8995 East Main Street, Reynoldsburg, OH 43068
Phone: 614-466-2732 • Fax: 614-466-6124
www.ohioagriculture.gov • administration@agri.ohio.gov

September 4, 2008

Lynn Buhl
Regional Administrator
U.S. Environmental Protection Agency, Region 5 (R-19J)
77 W. Jackson Blvd.
Chicago, IL 60604

Dear Ms. Buhl:

The Ohio Department of Agriculture (ODA) is pleased to submit the following updated information for consideration as part of the State's proposed transfer from the Ohio Environmental Protection Agency (Ohio EPA) to the ODA of regulatory responsibility over concentrated animal feeding operations under Clean Water Act (CWA) Section 402(b) (33.U.S.C. §1342(b)). An application for transfer of regulatory authority for CAFOs and revision of the State's NPDES Program was submitted by the State of Ohio on January 4, 2007 through a letter and 1600 page package sent by Governor Bob Taft to the Regional Administrator for the United States Environmental Protection Agency (EPA), Region 5.

This submittal includes proposed revisions to portions of the Ohio Revised Code and Ohio Administrative Code necessary to administer and enforce the NPDES program for concentrated animal feeding operations under the Clean Water Act. These revisions are proposed to address concerns and comments made by staff of EPA regarding the existing statutes and regulations previously established to govern the program. A summary of the proposed changes to each applicable statute and regulation is attached. The submittal also includes a signed Memorandum of Agreement that defines how ODA will administer the NPDES program for CAFOs, and how the program will be reviewed by EPA Region 5; the previous version was not signed.

The proposed amendments to rules included in this submittal are subject to the rulemaking and public comment procedures set forth in Chapter 119 of the Ohio Revised Code. The Department anticipates beginning these rulemaking procedures in the next 30-45 days. The Department will request that the General Assembly enact the proposed legislative changes later this year. We understand that EPA will not approve the Ohio program revision until all of the statutory and rule changes are effective. Additional statutory and regulatory changes affecting Ohio's state permit to install, state permit to operate, and state certified livestock manager programs for concentrated animal feeding facilities may be enacted as part of the same statutory and rulemaking actions. We are enclosing these changes for your information even though they are unrelated to the NPDES State program revision.

The Department is further aware that there are currently pending, in federal rulemaking procedures, revisions to the CAFO regulations in response to the *Waterkeeper* decision. The Department is committed to enacting any revisions to the State's NPDES authority that may

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NOV 0 8 2007

WN-16J

Robert J. Boggs, Director
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, Ohio 43068-3399

Dear Mr. Boggs:

I am writing in response to former Governor Taft's December 28, 2006, letter, in which the State of Ohio asked the U.S. Environmental Protection Agency, Region 5, to approve the transfer of National Pollutant Discharge Elimination System (NPDES) authority for concentrated animal feeding operations (CAFOs) from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture (ODA). The submittal included a program description, an Attorney General's statement, supporting statutes and regulations, a draft Memorandum of Agreement between ODA and EPA Region 5, and supporting documentation.

EPA is committed to working with the State as it seeks to transfer NPDES authority for CAFOs to ODA, and to ensure that the program is not disrupted during the transfer process. In April 2007, we provided an initial response to ODA, expressing four specific concerns regarding ODA's standards for land application of manure, litter, and process wastewater, and indicating that these concerns must be resolved, or they may prevent EPA from approving the revised program. ODA still must resolve these concerns. We also provided additional questions regarding ODA's land application standards, which ODA answered in a June 2007 letter. Thank you for your answers.

EPA Region 5 has been working with EPA Headquarters on a comprehensive review of the remainder of Ohio's application. Our review has identified an additional concern regarding application of manure on snow or frozen soil. Please see section II of the enclosure. In addition, certain aspects of ODA's statutory and regulatory authority do not appear to be consistent with federal regulations. We are therefore seeking clarification or revisions with respect to ODA's authority to regulate CAFOs to the extent required by the federal regulations. For each topic raised in section I of the enclosure, ODA will need to either revise the relevant provision or element of the application, or provide clarification as to the adequacy of its current authority.

Thank you for the opportunity to review Ohio's revised program. Once you have had an opportunity to review the enclosure, please have your staff contact Matt Gluckman, CAFO Coordinator, at (312) 886-6089 to discuss these issues, or feel free to contact me directly.

Sincerely yours,

/S/

Robert D. Tolpa
Acting Director, Water Division

Enclosure

cc: Chris Korleski, Director, Ohio EPA
Marc Dann, Ohio Attorney General
Mr. Kevin Elder, ODA
Mr. George Elmaraghy, Ohio EPA

bcc: Ms. Linda Boomazian, OWM
Ms. Allison Weideman, OWM-Permits Division
Mr. George Utting, OWM- Permits Division
Mr. Louis Eby, OWM- Permits Division
Michael Berman, CA-14J
Gary Prichard, CA-14J
Timothy Henry, WD-15J
Peter Swenson
Steven Jann
Matt Gluckman

G:NPDES/comment letter on ODA submittal 1107/M/Gluckman/11/16/07

ATTORNEY GENERAL'S
STATEMENT OF LEGAL AUTHORITY
FOR THE
OHIO DEPARTMENT OF AGRICULTURE'S
MAJOR CATEGORY PARTIAL PERMIT NPDES PROGRAM

I. Attorney General's Statement Of Legal Authority

This Statement of Legal Authority is to certify on behalf of the Department of Agriculture of the State of Ohio, pursuant to Section 402(b) of the Federal Water Pollution Control Act (or the Clean Water Act), as amended, 33 U.S.C. Section 1251, *et seq.* (hereinafter referred to as the "CWA"), that in the opinion of the Attorney General, the laws of the State of Ohio provide adequate authority for the Ohio Department of Agriculture (hereinafter referred to as the "ODA") to assume, implement, maintain and enforce a partial permit program for a major category of discharges in Ohio now covered under the National Pollutant Discharge Elimination System (hereinafter referred to as "NPDES") permit program of the Ohio Environmental Protection Agency (hereinafter referred to as "OEPA"). This partial permit program applies to discharges of pollutants, especially manure and process waste water, from the major point source category of Concentrated Animal Feeding Operations (hereinafter referred to as "CAFOs") as defined at 40 C.F.R. Sections 122.23(b)(2), (4), (6), (9) and 122.23(c), and from certain Animal Feeding Operations (hereinafter referred to as "AFOs) as defined at 40 C.F.R. Section 122.23(b)(1). This partial permit program also applies to certain discharges of storm water from CAFOs and AFOs.

Note that ODA's definition of Concentrated Animal Feeding Facility (hereinafter referred to as "CAFF") at O.R.C. Section 903.01(E) and ODA's definition of Large CAFO at O.R.C. Section 903.01(M) are identical to the federal definition of Large CAFO set forth at 40 C.F.R. Section 122.23(a)(4). ODA's definition of Medium CAFO at O.R.C. Section 903.01(Q) is identical to the federal definition of Medium CAFO set forth at 40 C.F.R. Section 122.23(a)(6).

ODA's definition of Small CAFO at O.R.C. Section 903.01(EE) and O.A.C. Rule 901:10-3-07 is identical to the federal definition at 40 C.F.R. Sections 122.23(b)(9) and (c).

In addition, note that ODA's definition of Animal Feeding Facility in O.R.C. 903.01(B) (hereinafter referred to as "AFF") is broader than the federal definition of AFO set forth at 40 C.F.R. Section 122.23(b)(1), as AFF includes the land application area for manure set forth at 40 C.F.R. Section 122.23(b)(3). The definition of AFF also includes the common ownership provision set forth in the federal definition of CAFO at 40 C.F.R. Section 122.23(b)(2).

This Statement of Legal Authority (hereinafter referred to as the "SOLA") presents citations to and analyses of the Ohio statutes and rules which provide ODA with the authority to assume a partial NPDES permit program as provided for at 33 U.S.C. Section 1342(n)(3) and 40 C.F.R. Section 123.1(g). When Senate Bill 393, which was signed by the Governor on December 27, 2006, and the rule amendments heard without comment by Ohio's Joint Committee on Agency Rule Review ("JCARR") on December 28, 2006 become effective, the Ohio statutes and rules described will provide ODA with the authority to issue permits for discharges of pollutants, especially manure and process waste water, from CAFOs and certain AFOs and discharges of storm water from CAFOs and AFOs in compliance with the NPDES program set forth in the CWA and its implementing regulations.

Pursuant to federal requirements, ODA's NPDES program for CAFOs and AFOs encompasses a significant and identifiable part of the State of Ohio's NPDES program. Other aspects of the ODA program are described in the Program Description submitted by ODA, including the Compliance and Enforcement Program Description, the Memorandum of Agreement between ODA and OEPA, and the Memorandum of Agreement between ODA and the Ohio Department of Natural Resources (hereinafter referred to as "ODNR"). These documents are incorporated herein by reference as if fully set forth in this SOLA.

The legal authorities referred to in this SOLA are properly adopted Ohio statutes,

contained in the Ohio Revised Code, and are properly adopted rules, with the exception of the rule package mentioned below, contained in the Ohio Administrative Code (hereinafter referred to as the "O.A.C." or the "Administrative Code"). An affidavit from the ODA testifying that all currently effective rules have been properly adopted is contained in the program package submitted by the ODA. In addition, the SOLA refers to legislation amending O.R.C. 903.08 and O.R.C. 6111.04 which was passed by the Ohio General Assembly in Senate Bill 393 and adopted and signed into law by the Governor on December 27, 2006. Senate Bill 393 will become effective on March 27, 2007. Finally, a package of rule amendments, which include amendments to OAC 901:10-1-01, 901:10-2-14, 901:10-2-14 Appendix A, 901:10-2-14, Appendix E, 901:10-3-01, 901:10-3-02, 901:10-3-05, 901:10-3-06, 901:10-3-07, 901:10-3-08, 901:10-3-11, and 901:10-1-4-05, was public noticed and filed with JCARR on November 14, 2006. These rules were approved by JCARR on December 28, 2006 without comment and now await adoption by the ODA. The earliest date that ODA could adopt these rule changes is some date after January 16, 2007. The rule changes will become effective ten days after they are adopted by the ODA.

The statutory authorities cited in this SOLA in most instances utilize the language of the CWA, federal regulations, and the model Attorney General's Statement provided by the United States Environmental Protection Agency (hereinafter referred to as "USEPA"). Revised Code Sections 119.03(b) and 121.72 allow for incorporation or adoption of any federal statute and regulations by reference. This issue is discussed more fully in Section N of this SOLA entitled "Incorporation by Reference."

This certification is issued, in part, on the understanding that legislation which has been passed by the Ohio General Assembly in S.B.393, signed by the Governor on December 27, 2006, and which will be effective March 27, 2007, will amend Ohio Revised Code ("R.C.") 903.08 and R.C. 6111.04. This certification evaluates the legal authority based on the statutes as

amended effective March 27, 2007. This certification is further qualified because in some areas it is based on rule amendments that have been proposed but cannot yet be finalized. As stated above, a package of rule amendments was public noticed, filed with JCARR on November 14, 2006, and heard before JCARR on December 28, 2006 without comment. The earliest date that ODA could adopt these rule changes is some date after January 16, 2007, and the rules cannot be effective until ten days after adoption.

Subject to the limitations and representations set forth above and in the following discussion, I hereby certify that the laws of the State of Ohio provide adequate authority for the ODA to assume, implement, maintain and enforce a partial permit program for a major category of discharges in Ohio now covered under the NPDES permit program of the OEPA

JIM PETRO
ATTORNEY GENERAL

Date: 1-4-07

II. Transfer Of Authority From Ohio Environmental Protection Agency To Ohio Department Of Agriculture

a. Two-Stage Transfer of Authority

Senate Bill 141 (hereinafter referred to as "S.B. 141"), which was signed into law by Governor Taft on December 14, 2000 and became effective on March 15, 2001, enacted O.R.C. Chapter 903 entitled "Concentrated Animal Feeding Facilities." Chapter 903 provides for a two-stage transfer of authority in Ohio from OEPA to ODA to regulate the discharge of pollutants and storm water from CAFOs and AFOs.

Under the first stage, authority was transferred from OEPA to ODA for the state Permits to Install (hereinafter referred to as "PTIs") and the state Permits to Operate (hereinafter referred to as "PTOs") when the Director of ODA finalized the PTI and PTO program, i.e. when the Director adopted the necessary rules and hired the necessary personnel. See O.R.C. Sections 903.02(A)(2) and 903.03(A)(2). JCARR conducted its final hearing on ODA's proposed rules on June 3, 2002. The rules were placed on JCARR's consent agenda, were declared final by ODA, and became effective July 2, 2002 pursuant to O.R.C. Section 119.03(I). The rules can be found at O.A.C. Chapter 901:10. The necessary employees were hired by the Director of ODA by August of 2002. These employees are in ODA's Livestock Environmental Permitting Program (hereinafter referred to as "LEPP") and are described in ODA's Program Description. Subsequently, the State PTI and PTO program was finalized on August 19, 2002.

With the finalization of ODA's PTI and PTO program, ODA had the authority to enforce the terms and conditions of PTIs previously issued by OEPA for CAFOs and AFOs. See O.R.C. Section 903.04(B).[1] With the finalization of ODA's PTI and PTO program, PTIs previously issued by OEPA for CAFOs and AFOs are deemed to have been issued under O.R.C. Chapter 903. See O.R.C. Section 903.04(B). Persons who were issued PTIs by OEPA for a CAFO or

[1] Note that OEPA only issued PTIs, not PTOs, for CAFOs and AFOs.

AFO may continue to operate under the PTI issued by OEPA until either of the following occurs: (1) the PTI issued by OEPA is terminated through the denial of a Review Compliance Certificate (hereinafter referred to as "RCC"); or (2) the person is required to obtain a PTO from ODA. See O.R.C. Sections 903.04 (C)(1) and (2). Within two years from the date of finalization of the PTI and PTO program, ODA was required to inspect each CAFO or AFO previously issued a PTI by OEPA and determine if the facility was being operated in accordance with its PTI; was being operated in a manner that protects the waters of the state; and was being operated in a manner that minimized the presence and negative effects of insects and rodents at the facility and in the surrounding areas. See O.R.C. Sections 903.04(E) and (F). If all those criteria were met, ODA issued the facility a RCC which is valid for five years. See O.R.C. Section 903.04(H)(1). No later than 180 days before the expiration of an RCC, the owner or operator of the facility must apply for a PTO from ODA. See O.R.C. Section 903.04(H)(1).

After ODA finalized its state PTI and PTO program, USEPA issued its CAFO Final Rule. The CAFO Final Rule was signed on December 15, 2002, was published in the Federal Register on February 12, 2003, and became effective on April 14, 2003. In response, ODA revised both its statute and its rules. Chapter 903 of the O.R.C. was revised by House Bill 152 (hereinafter referred to as "H.B. 152") which went into effect on November 11, 2003. Chapter 901:10 of the O.A.C. was revised and the new rules went into effect on September 15, 2005.[2]

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[2] Since USEPA issued its CAFO Final Rule, there have been a number of challenges to the rule in the federal courts. In *Waterkeeper Alliance, Inc. et al. v. USEPA*, 339 F.3d 486 (2nd Cir., 2005), the Second Circuit vacated certain provisions of the CAFO Final Rule including *inter alia*: (1) the issuance of permits without reviewing the terms of the nutrient management plans; (2) the issuance of permits that do not include the terms of the nutrient management plans and without adequate public participation; and (3) the requirement that all CAFOs apply for NPDES permits or otherwise demonstrate "no potential discharge." The USEPA public noticed revisions to the CAFO rule incorporating the changes dictated by the *Waterkeeper Alliance* decision on June 30, 2006. The revisions have not been finalized.

There have also been two cases which successfully challenged some procedural aspects of the general NPDES permit scheme which also will have implications for CAFOs. The precise

Under the second stage, O.R.C. Sections 903.08(B)(1) and 903.08(C)(1) provide for the transfer of authority from OEPA to ODA for issuing NPDES permits for the discharge of pollutants, especially manure, process waste water and storm water from CAFOs and AFOs, after USEPA approves the program submitted by the Director of ODA. However, the statutory duty of CAFOs to apply for an individual NPDES permit or coverage under a general NPDES permit, as it currently appears in O.R.C. 903.08(B)(1), will be removed with Senate Bill 393, which was passed by the Ohio General Assembly, was adopted and has been signed into law by the Governor, and will become effective on March 27, 2007. Senate Bill 393 amends O.R.C. 903.08(B)(1) to remove the provisions which deem each CAFO to be a point source that discharges manure to waters. Further, the legislation removes the "no potential to discharge" NPDES permit exception currently in R.C. 903.08(B)(1). Until this legislation becomes effective on March 27, 2007, CAFOs are still presumed to be a point source that are required to apply for a NPDES permit. Upon program approval by the USEPA, the ODA will have the authority to require a CAFO to obtain a permit. The amendment to O.R.C. 903.08 will require any person required by the Federal Water Pollution Control Act or regulations thereunder to apply for NPDES individual permits or general NPDES coverage. Upon approval of ODA's NPDES program by USEPA, ODA will have the authority to enforce the terms and conditions of NPDES permits previously issued by OEPA for CAFOs and AFOs as well as for previously unpermitted CAFOs and AFOs. See O.R.C. Section 903.08(A)(2). Upon approval of ODA's

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effect on CAFOs is unknown at this time as the rulings represent a split in the federal courts over the applicability of the public participation requirements of the CWA to general NPDES permits. In *Environmental Defense Center, et al. v. USEPA*, 344 F.3d 832 (9th Cir., 2003), the Ninth Circuit held that certain provisions of the Phase II stormwater regulations requiring NPDES permits contravened the CWA in that they failed to provide for review of the notices of intent ("NOIs") for general permits and filed to make the NOIs available to the public and subject to public hearings and other public participation under the CWA. By contrast, in *Texas Independent Procedures, et al. v. USEPA*, 410 F.3d 964 (7th Cir., 2005), the Seventh Circuit held that NOIs for general NPDES permits for stormwater discharges from construction activities are not subject to the CWA's requirements for public hearing and public notice are as they are neither permits nor permit applications.

NPDES program by USEPA, NPDES permits previously issued by OEPA for CAFOs and AFOs shall be considered to have been issued under O.R.C. Chapter 903. See O.R.C. Section 903.08(A)(2). Persons who have been issued an NPDES permit by OEPA for the discharge of pollutants or storm water from a CAFO or AFO may continue to operate under the OEPA NPDES permit until it expires or is modified or revoked. See O.R.C. Sections 903.08 (B)(2) and 903.08 (C)(2).

b. Scope of ODA's NPDES Authority and OEPA's NPDES Authority

On August 12, 2002, OEPA and ODA entered into a Memorandum of Agreement setting forth their respective responsibilities for regulating public health and the environment as impacted by CAFOs and AFOs. Upon approval of ODA's NPDES program for CAFOs and AFOs, ODA will have the legal authority and responsibility for:

> administration of the NPDES program requirements for permitting, for compliance evaluations, and for enforcement authority with respect to NPDES permits for CAFOs, including animal feeding operations (AFOs), and for NPDES permits for the discharge, transport or handling of stormwater from animal feeding facilities in Ohio. ODA will be responsible for the enforcement program for unauthorized discharges regulated under Revised Code 903.08 from AFOs in Ohio by taking timely and appropriate actions in accordance with the CWA and applicable state law (Chapter 903. of the Revised Code).

Memorandum of Agreement between ODA and OEPA, pp. 4 and 5.

Even after approval of ODA's NPDES program for CAFOs and AFOs, OEPA will continue to have legal authority and responsibility to do the following:

> administer NPDES requirements for permitting, for compliance evaluations, and for enforcement authority with respect to all other NPDES permits in Ohio, including the pretreatment and sewage sludge program.
>
> OEPA is responsible for processing new, modified, and renewed NPDES permits for non-domestic wastewater discharges, including industrial, commercial, and silviculture. OEPA is responsible for processing new, modified, and renewed NPDES permits for domestic wastewater discharges, including publicly owned treatment works and privately owned treatment works.

NUMBER: DSW 0400.025
ISSUED:
EXPIRES:
STATUS: DRAFT INTERIM
(12/10/95)
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LIVESTOCK WASTE AND WASTEWATER MANAGEMENT

Purpose:

The purpose of this policy is to establish procedures and guidelines for regulating new livestock operations designed to handle waste from over 1,000 animal units or operations that are expanding to handle waste from a total of over 1,000 animal units. This policy also applies to existing facilities (of greater than 1,000 animal units) that are not complying with current requirements (e.g. facilities that failed to apply for a Permit to Install). This policy establishes procedures regulated entities must follow to obtain approvals and the criteria for the design and management of livestock waste and wastewater management systems.

Additionally, this policy is being issued as an interim policy to be effective for a period of two years. The intent of issuing this policy as interim is to allow the agency to develop a standard for review of livestock operations while more in depth studies are being performed on various livestock management issues. A commission of officials involved in livestock waste management from the tri-state area (Michigan, Indiana and Ohio) as well as members from various state and local agencies has been organized to perform these studies.

Applicable Regulations:

ORC 6111.44, ORC 6111.45, ORC 6111.46
OAC 3745-31, OAC 3745-33

Background:

The Ohio EPA regulates the storage, collection, treatment and disposal of manure and wastewaters from new or expanding livestock operations handling more than 1,000 animal units by requiring the submission of an application for a Permit to Install (PTI), a Livestock Waste Management Plan and, if applicable, a NPDES Permit. The requirements of the U.S.EPA NPDES Permit rules for concentrated animal feeding operations (40 CFR 412) must be met.

Ohio EPA will review all information available on the design capacity of a particular facility, including the dimensions and type of the planned waste treatment system, the size of the barn(s) for housing the animals, and the dimensions of the property where the facility will be developed. The Agency will also consider the proposed number of animal units, but will focus on the current design capacity of the planned or proposed waste treatment system in making the final decision to require a permit to install and plan approval.

Ohio EPA will not require a permit to install for a treatment works or disposal system for

compliance with the siting criteria or for demonstrating that the ground water monitoring system will be located appropriately. If a full hydrogeologic investigation is needed, results should be discussed with the Ohio EPA district office before designing the earthen facility. Local SWCD and/or NRCS agents shall be invited to participate in the site inspections.

2. PTI Application: The applicant shall submit a complete application for a Permit to Install including the required fee to the Ohio EPA District Office having jurisdiction over the county that the facility will be located in. Four copies of detailed plans and specifications for the livestock waste management facilities must be included. Waste management facilities include manure storage and treatment units; facilities for the collection, storage, treatment and disposal of contaminated runoff and drainage; and other facilities for collection, treatment and disposal of other waste streams which would include but not be limited to: sewage, milking facility wastewaters, silage drainage, and egg washing wastewaters.

   If an earthen storage or treatment facility is proposed, one of the following must be submitted as part of the design report:

   - a demonstration of compliance with the siting criteria in Appendix A; or
   - a full hydrogeologic site investigation report justifying the location and number of monitoring wells at the facility, as well as a groundwater monitoring plan that includes well locations, well construction diagrams, and a ground water sampling and analysis plan.

3. Detailed Plans: Provide detailed, scaled engineering drawings of sufficient quality for microfilming. A professional engineer stamp is recommended. The drawings must include plan views, and cross sections with dimensions and elevations of collection ditches, lagoons,liners, holding tanks, scraping, flushing/pumping systems, and any other components essential to the collection, storage, treatment, and conveyance of all wastes.

   The engineering drawings must include:

   A copy of a topographic map (Suggested scale: 1" = 2000') showing the boundaries of the livestock complex site, all roads, streams, lakes, houses, public buildings, recreation areas, etc. within a one-mile radius of the livestock complex.

   A site plan with 2 foot contours (Suggested scale: 1" = 50') which shows the location of all

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[From a Fact Sheet Prepared by the Ohio EPA]

April 1999

Ohio has more than 70,000 farms. The majority house some type of livestock, although most do not require permits from Ohio EPA for installation or operation because they are not large enough to be regulated. Ohio EPA has approved permits for approximately 110 livestock operations around the state. This fact sheet is designed to answer some of the questions regarding livestock facilities and Ohio EPA's role regarding these facilities.

When does a livestock operator require Ohio EPA permits?
The need for a permit is based on the number of animals that a livestock operation's waste handling and storage system is designed to accommodate. The following require Ohio EPA permits:

- slaughter or feed cattle (1,000)
- mature dairy cattle (700)
- swine, each weighing more than 55 lbs. (2,500)
- horses (500)
- sheep or lambs (10,000)
- turkeys (55,000)
- laying hens or broilers, continuous overflow watering-solid manure (100,000)
- laying hens or broilers, liquid manure (30,000)
- ducks (5,000)

While smaller facilities, designed to handle fewer animals, are not required to obtain permits, Ohio EPA can take enforcement action if these facilities cause water pollution problems.

What Ohio EPA permits are required for a livestock facility?
There are two types of Ohio EPA permits that may apply to a livestock facility in Ohio: National Pollutant Discharge Elimination System permit (NPDES) and permit to install (also known as an installation permit). These permits must be obtained prior to construction or expansion of the facility.

NPDES Permit - Anyone wishing to discharge treated wastewater into waters of the state first must obtain an NPDES permit from Ohio EPA. While a lowering of water quality may be allowed, the activity always must meet state water quality standards that protect human health or aquatic life.

Permit-to-Install (PTI) - A PTI must be obtained from Ohio EPA for the construction of any wastewater treatment or collection system or disposal facility. The PTI outlines technical and design requirements for construction of a wastewater treatment/collection system. Ohio EPA and the Natural Resource Conservation Service use similar guidelines for system design. The PTI also may include a livestock manure or wastewater management plan which specifies how, when and where animal manure or wastewater will be handled. It is used for systems that store, stabilize, transport or apply animal manure or wastewater to land. The manure or wastewater management plan provides a documented method of operation that will prevent land-applied manure or wastewater from impacting water quality.

Does Ohio EPA require air permits?
Ohio EPA evaluates each agricultural permit application to determine whether or not an air permit is required. Ohio EPA's [illegible] must decide if the application is exempt from Ohio EPA's air pollution regulations. Under Ohio law, fugitive dust emissions from livestock facilities are exempt if:

- the emissions are not unusual in terms of normal agricultural activity and are not occurring as

a result of improper facility operation;

- the land on which the facility stands was consistently used for agricultural production before nonagricultural activity was established near the facility;
- the emissions do not substantially and adversely affect public health and safety; and
- the emissions are not of a large enough volume to require a federal permit.

Ohio EPA has found that most livestock facilities in Ohio are exempt from air pollution regulations.

What does Ohio EPA's permit review include?
Ohio EPA has the authority to require:

- approvable wastewater and livestock manure management;
- construction of the facilities meet current design standards;
- proper storage, handling and disposal of manure and dead animals;
- proper land application rates of manure;
- a permit-to-install for additional wastewater treatment;
- permits to ensure proper management of storm water during construction activities; and
- appropriate monitoring requirements.

Under current state law, Ohio EPA does not have the authority to consider:

- past compliance history at other facilities owned or operated by the applicant;
- animal rights issues;
- local zoning;
- popularity of proposed site;
- potential increase in road usage;
- possible effects the facility might have on property values;
- the personal or professional background of the applicant; and
- potential for draw down of private wells.

How does Ohio EPA regulate the application of manure?
Discharges of manure wastewater to waterways are prohibited. Liquid manure must be applied at least 200 feet away from occupied buildings, wells or springs and 50 feet from ponds, lakes and streams, field tile inlets, grass waterways and ditches. Dry manure must be applied at least 25 feet away from ponds, lakes, streams, field tile inlets, grass waterways and ditches.

Why can't Ohio EPA consider property values?
The permit-to-install rules for wastewater treatment facilities specifically outline the criteria the director may consider as part of his decision to approve or deny a PTI application. The potential impact of the facility on property values is not included among the criteria specifically listed in this rule.

Is well water draw down regulated?
Water use is not regulated in Ohio. However, the Ohio Department of Natural Resources [illegible] can assist citizens by assessing the static and draw-down levels of their wells before and after production wells are drilled at a livestock facility to determine if draw down occurs after the facility starts operations. For more information, please call ODNR-Division of Water at (614) 265-6717.

What can be done about flies and odors?
Odor and fly nuisances can be minimized with proper management of manure and dead animals. Ohio EPA can request additional controls or restrictions to minimize nuisance odors, flies and vectors that result from the storage of manure, wastewater and dead animals.

What other responsibilities does Ohio EPA have regarding livestock facilities?
Permit Review - Ohio EPA is responsible for reviewing permit applications and plans to ensure livestock operations do not harm human health and the environment.

Compliance Inspections Ohio EPA performs periodic inspections of permitted livestock facilities.

Technical Assistance - Ohio EPA offers technical assistance to livestock facility owners and operators to ensure that a facility is using the best available technology (BAT), to assist owners in the permitting process and to resolve problems and concerns.

Financial Assistance - Ohio is the first state in the nation to use an innovative concept, the linked deposit program, to provide loans to individuals. Individual farmers or homeowners can apply for below-market interest rate loans to fund projects that will improve water quality, such as erosion

Ohio's CAFO Program

1.0 Background

Based upon information provided to EPA by USDA, there are 532 AFOs with 300 to 1,000 animal units and 212 AFOs with more than 1,000 animal units in Ohio (USDA, 1999; USDA, 2000). Ohio has 130 facilities with more than 1,000 AU that have received installation permits and/or livestock waste management plans approval from Ohio EPA (Jones, Speck, Daily, 2000).

2.0 Lead Regulatory Agency

Senate Bill 141 transfers the authority to issue NPDES permits for the discharge of manure from point sources into waters of the state and for storm water resulting from an animal feeding facility (AFF) from the Director of Environmental Protection to the Director of Agriculture. The authority to issue these permits depends upon the approval of the Director of Agriculture's permit plan by the U.S. EPA. Authority to issue permits to construct or modify concentrated animal feeding facilities (CAFF) also was transferred to the Director of Agriculture (OLSC, 2002). The Division of Soil and Water Conservation, Ohio Department of Natural Resources, addresses pollution problems from operations with fewer than 1,000 animal units, which are not required to obtain permits (Hutchinson, 1996).

3.0 State Regulations Regarding AFOs/CAFOs

Ohio Revised Code (OR) 6111 prohibits the controlled discharge of waste directly into state waters (Veenhuizen et al., 2000). Ohio Revised Code 307.204 and 505.226 require written notification of new or expanding CAFF to local county and township boards, and an agreement regarding the CAFF operations between the CAFF and the county, and CAFF and the township before a permit is issued. Senate Bill 141 transfers the authority to regulate NPDES discharges to the Ohio Department of Agriculture and requires all farms with 1,000 AUs be regulated by permit and utilize Best Management Practices and Comprehensive Nutrient Management Plans. The program also requires plans for insect and rodent control (Jones et alt., 2000). Livestock facilities are affected by Ohio's Stream Litter Act (ORC 1531.29), which specifies that any person putting wastes into Ohio's waters may be guilty of a violation (Hutchinson, 1996).

4.0 Types of Permits

Three types of Ohio EPA approvals may apply to an animal operation in: an NPDES permit, an installation permit (formerly a permit-to-install), and a livestock waste management plan. An animal operation may need to have more than one permit or management plan (Hutchinson, 1996).

NPDES

Currently there are potentially two types of NPDES permits that a livestock operator would need: an NPDES wastewater permit and an NPDES storm water permit.

Senate Bill 141 prohibits a person, on and after the date on which the U.S. EPA approves the NPDES program submitted by the Director of Agriculture, from discharging manure from a point source into waters of the state, or from discharging storm water resulting form an AFF, without first obtaining a NPDES permit issued by the Director of Agriculture. Persons who have been

issued a NPDES permit by the Director of Environmental Protection for the discharge of manure or the discharge of storm water from an AFF prior to the date on which the U.S. EPA approves the NPDES program submitted by the Director of Agriculture may continue to operate under that permit until it expires or is modified or revoked (OLSC, 2002).

The Department of Agriculture is required to issue general NPDES permits when applicable instead of individual NPDES permits if these conditions are met:

- Any discharges authorized by a general permit will have only minimal cumulative adverse effects on the environment when the discharges are considered collectively and individually.
- The discharges are more appropriately authorized by a general permit than by an individual permit.
- Each category of point sources satisfies the criteria in all applicable rules.

Persons issued an NPDES permits by the agency must comply with the requirements in the Draft Rule for:

- Standard terms and conditions
- Effluent limitations

And these regulations:

- Applicable water quality standards adopted under Section 6111.041 of the Revised Code
- National standards of performance for new sources
- The antidegradation policy adopted under Section 611.12 of the Revised Code

An NPDES construction storm water permit is necessary if more than 5 acres of land will be cleared, graded, or excavated.

Other

Currently an NPDES wastewater permit issued by the Director of Ohio EPA authorizes a discharge to waters of the state and sets limits on the amount of pollutants allowed to be discharged. This permit is rarely used for animal waste in Ohio.

An NPDES construction storm water permit is necessary if more than 5 acres of land will be cleared, graded, or excavated.

An installation permit (also referred to as a permit-to-install or PTI) can be thought of as a construction permit. It is required for new, modified, renovated, or expanding livestock waste treatment/disposal systems that are designed to serve more than 1,000 animal units or have a controlled direct discharge to waters of the state. An installation permit also is required for construction of sanitary treatment facilities serving restrooms not associated with a private dwelling, for any size operation. If a facility falls under both categories, a single permit can be issued for the whole project. Plans must be approved by the Director of Ohio EPA before construction begins (Hutchinson, 1996).

The draft rules state that except for a CAFF that is operating under an installation permit or a

pollution by animal waste or soil sediment, including attached substances, resulting from farming, silvicultural, or earthmoving activities regulated by Chapter 307. or 1515. of the Revised Code. ~~Division (F)(3) of this section does not authorize, without a permit, any discharge from a treatment works for treating animal wastes having a controlled direct discharge into the waters of the state or any discharge that is prohibited by, or for which a permit is required by, regulation of the United States environmental protection agency.~~

(4) ~~The excrement of domestic and farm animals defecated on land or runoff therefrom into any waters of the state. Division (F)(4) of this section does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, regulation of the United States environmental protection agency.~~ ON AND AFTER THE DATE ON WHICH THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY APPROVES THE NPDES PROGRAM SUBMITTED BY THE DIRECTOR OF AGRICULTURE UNDER SECTION 903.04 OF THE REVISED CODE, AGRICULTURAL POLLUTANTS, AS DEFINED IN SECTION 903.01 of the Revised Code, OR STORM WATER FROM AN AGRICULTURAL OPERATION, AS DEFINED IN THAT SECTION;

(5) The discharge of sewage, industrial waste, or other wastes into a sewerage system tributary to a treatment works. Division (F)(5) of this section does not authorize any discharge into a publicly owned treatment works in violation of a pretreatment program applicable to the publicly owned treatment works.

(6) Septic tanks or any other disposal systems for the disposal or treatment of sewage from single-family, two-family, or three-family dwellings in compliance with the sanitary code and section 1541.21 or 3707.01 of the Revised Code. Division (F)(6) of this section does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, regulation of the United States environmental protection agency.

(7) Exceotional quality sludge generated outside of this state and contained in bags or other containers not greater than one hundred pounds in capacity. As used in division (F)(7) of this section, "exceptional quality sludge" has the same meaning as in division (Y) of section 3745.11 of the Revised Code.

(G) The holder of a permit issued under section 402 (a) of the Federal Water Pollution Control Act need not obtain a permit for a discharge authorized by the permit until its expiration date. The director shall administer and enforce those permits within this state and may modify their terms and conditions in accordance with division (J) of section 6111.03 of the Revised Code.

Sec. 6111.44. (A) Except as otherwise provided in DIVISION (B) OF THIS SECTION, IN section 6111.14 of the Revised Code, or in rules adopted under division (G) of section 6111.03 of the Revised Code, no municipal corporation, county, public institution, corporation, or officer or employee thereof or other person shall provide or install sewerage or treatment works for sewage, sludge, or sludge materials disposal or treatment or make a change in any sewerage or treatment works until the plans therefor have been submitted to and approved by the director of environmental protection. Sections 6111.44 to 6111.46 of the Revised Code apply to sewerage and treatment works of a municipal corporation or part thereof, an unincorporated community, a county sewer district, or other land outside of a municipal corporation or any publicly or privately owned building or group of buildings or place, used for the assemblage, entertainment, recreation, education, correction, hospitalization, housing, or employment of persons, ~~but do not apply to sewerage or treatment works installed or to be installed for the use of a private residence or dwelling, or to animal waste treatment or disposal works and related management and conservation practices that are subject to rules adopted pursuant to division (E)(4) of section 1511.02 of the Revised Code and involving less than one thousand animal units as animal units are defined in the United States environmental protection agency regulations. This exclusion does not apply to animal was direct discharge to waters of the state.~~

In granting an approval, the director may stipulate modifications, conditions, and rules that the public health and prevention of pollution may require. Any action taken by the director shall be a matter of public record and shall be entered in the director's journal. Each period of thirty days that a violation of this section continues, after a conviction for the violation, constitutes a separate offense.

(B) SECTIONS 6111.45 AND 6111.46 OF THE REVISED CODE AND DIVISION (A) OF THIS SECTION DO NOT APPLY TO ANY OF THE FOLLOWING:

(1) SEWERAGE OR TREATMENT WORKS FOR SEWAGE INSTALLED OR TO BE INSTALLED FOR THE USE OF A PRIVATE RESIDENCE OR DWELLING;

(2) ANIMAL WASTE DISPOSAL SYSTEMS AND RELATED MANAGEMENT AND CONSERVATION PRACTICES THAT ARE SUBJECT TO RULES ADOPTED UNDER DIVISION (E)(4) OF SECTION 1511.02 OF THE REVISED CODE AND INVOLVING LESS THAN ONE THOUSAND ANIMAL UNITS AS DEFINED IN SECTION 903.01 OF THE REVISED CODE;

(3) AGRICULTURAL POLLUTANTS, AS DEFINED IN SECTION 903.01 of the Revised Code, OR STORM WATER FROM AN AGRICULTURAL OPERATION, AS DEFINED IN THAT SECTION.

Section 2. That existing sections 1511.021, 3745.04, 6111.03, 6111.035, 6111.036, 6111.04, and 6111.44 of the Revised Code are hereby repealed.

Section 3. The amendments to section 6111.04 of the Revised Code by this act are operative on and after the date on which the United States Environmental Protection Agency approves the NPDES program submitted by the

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Director of Agriculture under section 903.04 of the Revised Code as enacted by this act.

Section 4. All items in this section are hereby appropriated as designated out of any moneys in the state treasury to the credit of the General Revenue Fund and the State Special Revenue Fund Group. For all appropriations made in this act, those in the first column are for fiscal year 2000 and those in the second column are for fiscal year 2001. The appropriations made in this act are in addition to any other appropriations made for the 1999-2001 biennium.

AGR DEPARTMENT OF AGRICULTURE

General Revenue Fund					
GRF	700-414	Concentrated Animal Feeding Operation Advisory Committee	$	0	$ 25,000
GRF	700-418	Livestock Regulation Program	$	0	$ 1,700,000
TOTAL GRF General Revenue Fund			$	0	$ 1,725,000
State Special Revenue Fund Group					
5L8	700-604	Livestock Management Fund	$	0	$ 250,000
TOTAL SSR State Special Revenue Fund Group			$	0	$ 250,000
TOTAL ALL BUDGET FUND GROUPS			$	0	$ 1,975,000

Within the limits set forth in this act, the Director of Budget and Management shall establish accounts indicating the source and amount of funds for each appropriation made in this act and shall determine the form and manner in which appropriation accounts shall be maintained. Expenditures from appropriations contained in this act shall be accounted for as though made in Am. Sub. H.B. 283 of the 123rd General Assembly.

The appropriations made in this act are subject to all provisions of Am. Sub. H.B. 283 of the 123rd General Assembly that are generally applicable to such appropriations.

Section 5. (A) As used in this section, "agricultural operation" and "agricultural pollutant" have the same meanings as in section 903.01 of the Revised Code, as enacted by this act.

(B) On the date on which the Director of Agriculture has finalized the program required under division (B)(1) of section 903.02 of the Revised Code, as enacted by this act, the Director of Environmental Protection shall provide the Director of Agriculture with both of the following:

(1) Copies of all permits issued under division (J)(1) of section 6111.03 of the Revised Code for the installation of disposal systems for agricultural operations that were issued on or before that date together with any related information that the Director of Agriculture requests;

(2) All permit applications and accompanying information that were submitted under division (J)(1) of section 6111.03 of the Revised Code prior to the date specified in division (B) of this section for the installation of disposal systems identified in that division.

(C) On the date on which the United States Environmental Protection Agency approves the NPDES program submitted by the Director of Agriculture under section 903.04 of the Revised Code, as enacted by this act, the Director of Environmental Protection shall provide the Director of Agriculture with both of the following:

(1) Copies of all permits issued under division (J)(1) of section 6111.03 of the Revised Code for the discharge of agricultural pollutants and the discharge of storm water from agricultural operations that were issued on or before that date together with any related information that the Director of Agriculture requests;

(2) All permit applications and accompanying information that were submitted under division (J)(1) of section 6111.03 of the Revised Code prior to the date specified in division (C) of this section for the activities identified in that division.

Section 6. The codified and uncodified sections of law contained in this act are subject to the referendum. Therefore, under Ohio Constitution, Article II, Section 1c and section 1.471 of the Revised Code, the codified and uncodified sections of law contained in this act take effect on the ninety-first day after this act is filed with the Secretary of State. If, however, a referendum petition is filed against the sections, the sections, unless rejected at the referendum, take effect at the earliest time permitted by law.

Section 7. Section 1511.021 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. S.B. 182 and Am. Sub. S.B. 226 of the 120th General Assembly, with the new language of neither

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6111.04 Water pollution and sludge management violations prohibited.

(A) Both of the following apply except as otherwise provided in division (A) or (F) of this section:

(1) No person shall cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state.

(2) Such an action prohibited under division (A)(1) of this section is hereby declared to be a public nuisance.

Divisions (A)(1) and (2) of this section do not apply if the person causing pollution or placing or causing to be placed wastes in a location in which they cause pollution of any waters of the state holds a valid, unexpired permit, or renewal of a permit, governing the causing or placement as provided in sections 6111.01 to 6111.08 of the Revised Code or if the person's application for renewal of such a permit is pending.

(B) If the director of environmental protection administers a sludge management program pursuant to division (S) of section 6111.03 of the Revised Code, both of the following apply except as otherwise provided in division (B) or (F) of this section:

(1) No person, in the course of sludge management, shall place on land located in the state or release into the air of the state any sludge or sludge materials.

(2) An action prohibited under division (B)(1) of this section is hereby declared to be a public nuisance.

Divisions (B)(1) and (2) of this section do not apply if the person placing or releasing the sludge or sludge materials holds a valid, unexpired permit, or renewal of a permit, governing the placement or release as provided in sections 6111.01 to 6111.08 of the Revised Code or if the person's application for renewal of such a permit is pending.

(C) No person to whom a permit has been issued shall place or discharge, or cause to be placed or discharged, in any waters of the state any sewage, sludge, sludge materials, industrial waste, or other wastes in excess of the permissive discharges specified under an existing permit without first receiving a permit from the director to do so.

(D) No person to whom a sludge management permit has been issued shall place on the land or release into the air of the state any sludge or sludge materials in excess of the permissive amounts specified under the existing sludge management permit without first receiving a modification of the existing sludge management permit or a new sludge management permit to do so from the director.

(E) The director may require the submission of plans, specifications, and other information that the director considers relevant in connection with the issuance of permits.

(F) This section does not apply to any of the following:

(1) Waters used in washing sand, gravel, other aggregates, or mineral products when the washing and the ultimate disposal of the water used in the washing, including any sewage, industrial waste, or other wastes contained in the waters, are entirely confined to the land under the control of the person engaged in the recovery and processing of the sand, gravel, other aggregates, or mineral products and do not result in the pollution of waters of the state;

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(2) Water, gas, or other material injected into a well to facilitate, or that is incidental to, the production of oil, gas, artificial brine, or water derived in association with oil or gas production and disposed of in a well, in ompliance with a permit issued under Chapter 1509. of the Revised Code, or sewage, industrial waste, or other wastes injected into a well in compliance with an injection well operating permit. Division (F)(2) of this section does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, regulation of the United States environmental protection agency.

(3) Application of any materials to land for agricultural purposes or runoff of the materials from that application or pollution by residual farm products, manure, or soil sediment, including attached substances, resulting from farming, silvicultural, or earthmoving activities regulated by Chapter 307. or 1511. of the Revised Code. Division (F)(3) of this section does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, the Federal Water Pollution Control Act or regulations adopted under it. As used in division (F)(3) of this section, "residual farm products" and "manure" have the same meanings as in section 1511.01 of the Revised Code.

(4) The excrement of domestic and farm animals defecated on land or runoff therefrom into any waters of the state. Division (F)(4) of this section does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, the Federal Water Pollution Control Act or regulations adopted under it.

(5) On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code, any discharge that is within the scope of the approved NPDES program submitted by the director of agriculture;

(6) The discharge of sewage, industrial waste, or other wastes into a sewerage system tributary to a treatment works. Division (F)(6) of this section does not authorize any discharge into a publicly owned .reatment works in violation of a pretreatment program applicable to the publicly owned treatment works.

(7) A household sewage treatment system or a small flow on-site sewage treatment system, as applicable, as defined in section 3718.01 of the Revised Code that is installed in compliance with Chapter 3718. of the Revised Code and rules adopted under it. Division (F)(7) of this section does not authorize, without a permit, any discharge that is prohibited by, or for which a permit is required by, regulation of the United States environmental protection agency.

(8) Exceptional quality sludge generated outside of this state and contained in bags or other containers not greater than one hundred pounds in capacity. As used in division (F)(8) of this section, "exceptional quality sludge" has the same meaning as in division (Y) of section 3745.11 of the Revised Code.

(G) The holder of a permit issued under section 402 (a) of the Federal Water Pollution Control Act need not obtain a permit for a discharge authorized by the permit until its expiration date. Except as otherwise provided in this division, the director of environmental protection shall administer and enforce those permits within this state and may modify their terms and conditions in accordance with division (J) of section 6111.03 of the Revised Code. On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code, the director of agriculture shall administer and enforce those permits within this state that are issued for any discharge that is within the scope of the approved NPDES program submitted by the director of agriculture.

Amended by 130th General Assembly File No. TBD, SB 150, §1, eff. 8/21/2014.

.mended by 128th General AssemblyFile No.12, HB 363, §4, eff. 12/22/2009.

Amended by 128th General AssemblyFile No.9, HB 1, §640.22, eff. 7/1/2010.

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State of Ohio Environmental Protection Agency

STREET ADDRESS:
Lazarus Government Center
122 S. Front Street
Columbus, Ohio 43215

TELE (614) 644-3020 FAX (614) 644-3184
www.epa.state.oh.us

MAILING ADDRESS:
P.O. Box 1049
Columbus, OH 43216-1049

June 21, 2005

CERTIFIED MAIL

Dear Applicant

Re: Pending Ohio EPA Concentrated Animal Feeding Operation (CAFO) National Pollutant Discharge Elimination System (NPDES) Permit Application

U.S. EPA published updated regulations for CAFOs in February of 2003. The regulations went into effect in April 2003. As with many federal regulations, these were appealed by organizations representing the industry as well as organizations representing environmental groups. The appeals were consolidated and heard by the Second Circuit Federal Court of Appeals. The Appeals Court's decision on the case was released in February 2005. The environmental parties involved in the appeals case requested a rehearing on appeal the court's decision. This request for rehearing has been denied. Therefore, the court decision stands and the regulations regarding CAFOs have once again been modified.

In response, Ohio EPA must modify its CAFO NPDES permit program in accordance with the results of the appeals case. You are being contacted because you currently have a pending NPDES permit application for your livestock facility. This application is now, however, considered incomplete due to the court's ruling that CAFOs must submit a manure management plan to the NPDES permitting authority for review and approval as part of the NPDES permit process. The court also ruled that the NPDES permitting authority must provide for public participation in the manure management plan review process. As such, Ohio EPA is requesting that you submit a manure management plan to Ohio EPA for review that will be available for public review during the draft permit step in the permit process.

Since your facility is a new source, you are required to have a manure management plan that meets all requirements of the NPDES permit upon permit finalization. In order to facilitate the plan submittal and review process, Ohio EPA has created the attached forms that can be used to update an existing plan to meet the minimum NPDES permit requirements. For example, if your facility has received permit to operate from the Ohio Department of Agriculture (ODA) or developed a Comprehensive Nutrient Management Plan (CNMP) through the United States Department of Agriculture-Natural Resources Conservation Service (USDA-NRCS), the forms can be inserted into the existing plans and the

plan then submitted to Ohio EPA. Please read the forms thoroughly however since Ohio EPA has several requirements that may differ from those in existing plans that you will be required to follow.

Ohio EPA would like to minimize the setback this appeals court ruling has made on the implementation of the NPDES permit process, therefore we are requesting that you submit the manure management plans within 30 days of the receipt of this letter. Please submit the plans to: Melinda Harris, Ohio EPA, Division of Surface Water, P.O. Box 1049, Columbus, Ohio 43216-1049.

For those of you with ODA approved plans, it should be noted that ODA is aware of this letter and the changes Ohio EPA is requesting that you make to your existing plans. The ODA review and approval process of the plans for the state program cannot be counted for the requirements of the federal program because ODA is not the authorized NPDES permitting authority, and because the plans developed according to ODA's rules effective July 2, 2002 do not meet the minimum requirements of the NPDES regulations.

Should you have any questions, comments, and/or concerns, please feel free to contact Cathy Alexander at (614) 644-2021 or via email at cathy.alexander@epa.state.oh.us or me at (614) 728-1357 or via email at mharris@epa.state.oh.us.

Sincerely,

Melinda M. Harris

Melinda M. Harris
PTI, Compliance Assistance & CAFO Unit
Division of Surface Water

Attachments

ODA's jurisdiction. As discussed above, in this case, final approval of the State's request is contingent on Ohio's enactment and adoption of changes to Ohio law and administrative rules needed to resolve EPA's issues, as documented in ODA's September 4 letter. Upon enactment and adoption of these changes, the State will

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need to provide for EPA's review an Attorney General's statement that has been updated to reflect the adopted provisions. Upon review of the adopted provisions, EPA will request a revised program description and a revised MOA, should they be necessary. After the close of the comment period, the Regional Administrator for EPA Region 5 will approve or disapprove Ohio's request for ODA to implement the NPDES program for CAFOs based on the requirements of section 402 of the Act and 40 CFR part 123. If the Regional Administrator approves the request, she will so notify the State and sign the proposed MOA. Notice would be published in the Federal Register and, as of the date of program approval, authority to issue and enforce NPDES permits for CAFOs and for construction-related stormwater from AFOs in Ohio would shift from Ohio EPA to ODA in accordance with the State's transition process described in its program description. If the Regional Administrator disapproves Ohio's request, the State will be notified of the reasons for disapproval and of any revisions or modifications to the program that are necessary to obtain approval.

Open House. EPA, ODA and Ohio EPA staff will be available before the public hearing to answer questions.

Public Hearing Procedures. The public hearing will be conducted in accordance with 40 CFR 124.12. It will provide interested parties with the opportunity to give written and/or oral comments for the official record. The following procedures will be used at the public hearing. (1) The Presiding Officer will conduct the hearing in a manner which will allow all interested persons wishing to make oral statements an opportunity to do so; however, the Presiding Officer may inform attendees of any time limits during the opening statement of the hearing. (2) Any person may submit written statements or documents for the hearing record. (3) The Presiding Officer may, in his or her discretion, exclude oral testimony if such testimony is overly repetitious of previous testimony or is not relevant to the proposal to approve the revision to the Ohio NPDES program. (4) The transcript taken at the hearing, together with copies of all submitted statements and documents, will become a part of the record submitted to the Regional Administrator. (5) Hearing statements may be oral or written. EPA encourages submission of written copies of oral statements for accuracy of the record and for use of the Hearing Panel and other interested persons. Persons wishing to make oral testimony supporting their written comments are encouraged to give a summary of their points rather than reading lengthy written comments verbatim into the record. All comments received by EPA Region 5 by the deadline for receipt of comments, or presented at the public hearing, will be considered by EPA before taking final action on Ohio's request for ODA to implement the NPDES program for CAFOs.

Summary of Ohio's Submission. Ohio has requested to transfer the responsibility of regulating CAFOs and storm water associated with construction of AFOs under the NPDES program from Ohio EPA to ODA. This transfer would include, but not be limited to regulation of manure, litter, and process wastewater and construction and industrial storm water discharges from CAFOs, and construction-related storm water discharges from other AFOs. If Ohio's request is approved, Ohio EPA would continue to be responsible for implementing all other aspects of

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required by the Act. Section 402 also provides that EPA may approve a state to administer an equivalent state program, upon the Governor's request, provided that the state has appropriate legal authority and a program sufficient to meet the Act's requirements. The regulations applicable to state NPDES programs appear at 40 CFR part 123. They allow states to share administration of their NPDES programs among two or more agencies. 40 CFR 123.1(g) and 123.62(c). The CWA and NPDES regulations can be found at: http://cfpub.epa.gov/npdes/regs.cfm?program_id=0. EPA approved Ohio's request to implement the NPDES program on March 11, 1974. That approval recognized Ohio EPA as the agency responsible for implementing the State's approved program.

Under 40 CFR 123.62(c), states with approved NPDES programs must notify EPA whenever they propose to transfer all or part of any program from the approved state agency, and must identify any new division of responsibilities among the agencies involved. Under this section the new agency is not authorized to administer the program until the Regional Administrator approves the request. In a letter dated December 28, 2006, Ohio Governor Taft requested EPA's approval of Ohio's request to transfer authority to ODA to run the NPDES program for CAFOs and storm water associated with construction activity at AFOs in Ohio. The State's request included a program description, an amendment to the Memorandum of Agreement (MOA) between EPA and the State of Ohio, the statutes and rules ODA will use to implement its NPDES program for CAFOs, a statement of legal authority from the Ohio Attorney General, and supporting documentation. The program description addresses, among other topics, how Ohio intends to transfer implementation of the NPDES program for CAFOs from Ohio EPA to ODA.

EPA Region 5 received Ohio's request in January 2007. EPA completed its review of the application in the fall of 2007. EPA communicated the outcome of its review in April and November 2007 letters to ODA. The letters expressed concern regarding five provisions in ODA's standards for land application of manure, litter and process wastewater. The letters also asked ODA to clarify or revise 26 provisions of its legal authority or NPDES permitting requirements. In a letter dated September 4, 2008, ODA committed to pursue specified statutory and rule changes to address the issues identified by EPA. ODA's letter also included other proposed statutory and regulatory changes beyond the scope of the changes needed to resolve the issues raised by EPA. ODA subsequently provided correct versions of certain proposed statutory and rule provisions that were not included with the September 4 letter. On October 3, 2008, EPA responded to ODA, stating its belief that enactment and adoption of the changes ODA has committed to pursue would resolve EPA's issues, and that the additional changes proposed by ODA will not adversely affect ODA's authority to administer the NPDES program.

Following consideration of public comments and testimony, EPA will make a final decision regarding the State's request in accordance with section 402(b) of the CWA and 40 CFR part 123, including 123.62(b). To obtain EPA approval of this revision to Ohio's approved program, the State must show, among other things, that ODA has the authority to: (1) Issue proper permits for CAFOs and storm water discharges from construction of AFOs, (2) impose civil and criminal penalties for violations, and (3) ensure that the public is given notice and an opportunity for a hearing on each proposed permit within the scope of ODA's jurisdiction. As discussed above, in this case, final approval of the State's request is contingent on

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16J, 77 West Jackson Boulevard, Chicago, Illinois 60604, or (800) 621-8431, extension 66089, or (312) 886-6089.

SUPPLEMENTARY INFORMATION: Section 402 of the Clean Water Act (CWA) established the NPDES program under which EPA may issue permits for the point source discharge of pollutants to waters of the United States under conditions required by the Act. Section 402 also provides that EPA may approve a state to administer an equivalent state program, upon the Governor's request, provided that the state has appropriate legal authority and a program sufficient to meet the Act's requirements. The regulations applicable to state NPDES programs appear at 40 CFR part 123. They allow states to share administration of their NPDES programs among two or more agencies. 40 CFR 123.1(g) and 123.62(c). The CWA and NPDES regulations can be found at:

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LONDON, Ohio – With a parcel of uncertainties that feel like log jams to many producers waiting to find out what they will have to do, the job of writing regulations for the permitting of Ohio's Concentrated Animal Feeding Facilities is almost done.

As of Sept. 19, 10 of the 15 areas for which the rule-making advisory committee of the Ohio Department of Agriculture needed to write new regulations were completed. Kevin Elder, director of the new Livestock Environmental Permitting Program, reported on the committee's progress during the Farm Science Review.

The process is moving right along. Elder now estimates that the regulations will be ready only a month later than originally announced.

The committee met again Sept. 24, and with three meetings scheduled during October, the current timeline is to have the regulatory structure completed by November to take effect in February of 2002.

The 16-member advisory committee is composed of nominated representatives of the various interests with a stake in the process, including producer groups, local officials, wastewater and drinking water utilities, environmental organizations, and four representatives of the public who were nominated by the Licking County citizens group, the Ohio Farmers Union, the Ohio Livestock Coalition, and the Ohio Federation of Soil and Water Conservation Districts.

At the charge of the governor, the group has worked to achieve consensus on each and every guideline included in the proposed regulations, Elder said.

Waiting for permits. There are a total of 130 feeding operations with 1,000 or more animal units around the state permitted under the former Ohio Environmental Protection Agency process. These operations will be inspected immediately in order to receive the new Department of Agriculture's permit to operate.

There are also a number of operations that have been waiting to expand until the new process is ready before they apply for an initial review to receive a permit to install.

In the end, Elder said the total number of feeding operations that will come under the jurisdiction of the permitting program under current federal rules will be around 200.

Once a facility has been permitted, Elder said, it will then be inspected twice a year.

The regulations being written are based on best management practices taken from the Soil and Water Conservation District standards, from the Environmental Protection Agency requirements, and from best scientific evidence, Elder said.

Create minimums. The advisory committee has tried to determine what would be the minimum standard consistent with good conservation, environmental protection, and federal requirements.

But it is the expectation, Elder said, that with the required inspections, the new livestock environmental permitting program will encourage better management and better operations.

"We will not be planning for accidents and reaction when something happens," Elder said, "but will be forcing action ahead of time in the interest of better management."

The regulations cover all aspects of manure storage, handling, transportation, and land application for large animal feeding operations, as well as an operation's plans and compliance for insect and rodent control.

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That would make the difference in having an effective inspection program and having a bureaucratic agency that just hands out permits, Elder said.

EPA timetable. The EPA recently announced it is reopening its comment period on the national regulations. It is now expecting to be ready to propose final rules by December 2002.

"But we want to get started with our program," Elder said. "Getting under way and anticipating what may happen will be better than just putting our program on a shelf and waiting. The guidelines we have written are too good for that."

About the Author

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- Keep sows performing even in cold weather
- Staying warm during cold weather

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- Alta, CRV create dairy AI partnership
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DLEP Home

Instructions to search permitted farms:
To narrow the permitted farms database, choose a county and/or category from the drop-down menus and click 'Search'.
Click the 'Print' button to display the results in .pdf format for printing or saving.

County: All Counties
Species: All Species
Permit Type: Permit to Install

Search | Reset | Print Query Results

Farm Name:	(b) (6) Dairy LLC	County:	way
Species:		No. of Animals:	(b)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A
Farm Name:	Millco, Inc.	County:	e
Species:	Swine (over 55 lbs)	No. of Animals:	(b)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A
Farm Name:	MSB Farms	County:	d
Species:	Dairy	No. of Animals:	(b)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	Fact Sheet
Farm Name:	(b) (6) Dairy, LLC	County:	H y
Species:		No. of Animals:	(b)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A
Farm Name:	(b) (6) Farms - Farm 3	County:	
Species:		No. of Animals:	(b)
Permit(s):	Permit to Operate Permit to Install	Publication(s):	N/A
Farm Name:	(b) (6) Farms, LLC - Farm 3	County:	H
Species:		No. of Animals:	(b) (6)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A
Farm Name:	(b) (6) Pullets, LLC	County:	
Species:	ts	No. of Animals:	(b) (6)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A
Farm Name:	(b) Dairy	County:	son
Species:		No. of Animals:	(b)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A
Farm Name:	(b) (6) Dairy LLC	County:	Paulding
Species:		No. of Animals:	(b)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A
Farm Name:	(b) (6) Farms, LLC	County:	ing
Species:		No. of Animals:	(b)
Permit(s):	Permit to Install Permit to Operate	Publication(s):	N/A

<< < > >> Goto Page: 5 Show: 10 per page Page 5 of 6

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OHIO DEPARTMENT OF AGRICULTURE
STATE OF OHIO

In re:

BUCKEYE EGG FARM, L.P. (b) (6) C	:	Order No. 2003-255
Respondents/Applicants	:	

ORDER

Based on the record before me I find that on August 19, 2002, the Ohio Department of Agriculture ("the Departm[redacted] ssued a Notice of Opportunity for Hearing to Buckeye Egg[redacted] L.P. and [redacted] Farm, LLC. The Notice advised Buckeye Egg Farm and [redacted] Farm of the Department's propos[redacted] sue an order revoking certain permits to install held by Buckeye Egg Farm or [redacted] Farm for failure to comply with Rules 901:10-1-03(A)(5), 901:10-1-03(B), and 901:10-1-10(F) of the Ohio Administrative Code ("OAC"). Further, the Department proposed to deny certain pending applications for permits submitted by Buckeye Egg Farm based on the applicant's history of substantial noncompliance in violation of OAC Rule 901:10-1-03(B). The specific permits proposed for revocation were:

(b) (6) facility -	PTI 01-382 PTI 01-454 PTI 01-491 PTI 01-382M PTI 01-2475 PTI 01-039-IW PTI 01-7152 PTI 01-7269
Mt. Victory facility -	PTI 03-7224 PTI 03-9594
(b) (6) facility -	PTI 03-11083-IW PTI 03-10878-IW.

The specific permit applications proposed for denial were:

(b) (6) facility -	PTI 01-265

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901:10-1-03 Criteria for decision-making.

(A) Criteria for decision making by the director. The director shall deny, modify, suspend or revoke a permit to install or permit to operate if:

(1) The permit application contains misleading or false information; or

(2) The designs and plans fail to conform to best management practices and to the rules in this chapter or if the owner or operator fails to build the facility in accordance with design plans as approved in the permit to install or in accordance with amended and approved design plans; or

(3) The plans for the manure management plan, the insect and rodent control plan and any other plans governing the operation fail to conform to best management practices and to rules of this chapter; or

(4) The director determines that the designs and plans describe a proposed discharge or source for which a NPDES permit is required under this chapter and that will conflict with an areawide waste treatment plan adopted in accordance with section 208 of the act; or

(5) The facility is not designed or constructed as a non-discharge system or operated to prevent the discharge of pollutants to waters of the state or to otherwise protect water quality; or

(6) The director determines that the applicant or owner or operator has not complied with rule 901:10-1-10 of the Administrative Code.

(B) The director may deny, modify, suspend or revoke a permit to install or permit to operate if the applicant, owner, operator or persons associated in the operation of concentrated animal feeding facilities, have a history of substantial noncompliance with the Federal Water Pollution Control Act, the Safe Drinking Water Act, as defined in section 6109.01 of the Revised Code, any other applicable state laws pertaining to environmental protection or environmental laws of another country that indicates that the applicant or owner or operator lacks sufficient reliability, expertise and competence to operate the facility in substantial compliance with Chapter 903. of the Revised Code and this chapter.

In evaluating a history of substantial noncompliance as required, the director may consider all of the following for a period of five years preceding the date of the application:

(1) Any information submitted on ownership and background pursuant to rule 901:10-1-02 of the Administrative Code, including the following:

(a) If the applicant or permittee is a publicly traded corporation, provide the full name, date of birth, and business address of each individual or business concern holding more than twenty-five per cent of the equity in the applicant or permittee; or

(b) If the applicant or permittee is a sole proprietor or any other business concern, provide the full name, date of birth, and business address of each individual or business concern holding more than fifty per cent of the equity in the applicant or permittee;

(c) If the applicant or permittee is a partnership, as partnership is defined in section 1775.05 of the Revised Code, provide the full name, date of birth, and business address of each individual or business concern holding more than fifty per cent of the equity in the applicant or permittee; and

(d) If the applicant or permittee is the recipient of a financial loan to the facility with provisions for the right to control management of the facility or actual control of the facility or the selection of officers, directors, or managers of the facility, identify the full name, date of birth, and business address of each individual or business concern providing the loan.

(2) Any administrative enforcement action (including an administrative order or notice of violation), civil suit, or criminal proceeding that is:

(a) Pending against the applicant or a business concern owned or controlled by the applicant;

(b) Resolved or dismissed in a settlement agreement, in a consent order or decrees, is adjudicated or otherwise dismissed and that may or may not have resulted in the imposition of:

(i) A sanction such as a fine, penalty, payment or work or service performed in lieu of a fine or penalty; or

(ii) Cessation or suspension of operations.

(c) Any revocation, suspension, or denial of a license or permit or equivalent authorization; or

(d) With respect to paragraph (B)(1)(a) of this rule, any explanation that the applicant or owner or operator may choose to submit.

(C) In addition to the criteria set forth in paragraphs (A) and (B) of this rule, the director shall deny, modify, suspend, or revoke an NPDES permit if the director determines::

(1) Discharge from the facility will prevent or interfere with attainment or maintenance of applicable water quality standards adopted under section 6111.041 of the Revised Code and the most current antidegradation policy adopted under section 6111.12 of the Revised Code; or

(2) Discharge from the facility will not achieve compliance with national effluent standards; or

(3) The administrator of the United States environmental protection agency objects in writing to the issuance of the NPDES permit in accordance with section 402(d) of the Act; or

(4) The proposed discharge or source will conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Act; or

(5) Forms, notices, or reports required pursuant to the terms and conditions of the NPDES permit are false or inaccurate;

(6) The discharge is of any radiological, chemical, or biological warfare agent or high-level radioactive waste or medical waste; or

(7) The United States army corps of engineers for the district in which the discharge is located objects in writing to the issuance of the NPDES permit as substantially impairing navigation or anchorage; or

(8) Discharge from the facility will not achieve national standards of performance for new sources; or

(9) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge; or

(10) The permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination; or

(11) The applicant or owner or operator is required to obtain a state or other appropriate certification under section 401 of the act and 40 CFR section 124.53 and that certification has not been obtained or waived;

(12) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states; or

(13) Discharge from the facility will not achieve and maintain compliance with other requirements of the act and the regulations promulgated thereunder.

Effective: 06/08/2014
R.C. 119.032 review dates: 03/21/2014 and 06/08/2019
Promulgated Under: 119.03
Statutory Authority: 903.08, 903.10
Rule Amplifies: 903.01 , 903.02 , 903.03 , 903.04 , 903.05 , 903.07 , 903.08 , 903.081 , 903.082 , 903.09 , 903.10
Prior Effective Dates: 7/2/2002, 9/15/2005, 1/23/2009, 9/1/2011

901:10-1-10 Prohibitions.

(A) No person shall modify an existing or construct a new concentrated animal feeding facility without first obtaining a permit to install issued by the director under section 903.02 of the Revised Code.

(B) Except for a concentrated animal feeding facility that is operating under an installation permit issued by the director of environmental protection or a review compliance certificate issued by the director, on and after the date on which the program has been finalized under section 903.01 of the Revised Code, no person shall operate a concentrated animal feeding facility without a permit issued by the director under section 903.03 of the Revised Code.

(C) No person to whom a NPDES permit has been issued shall discharge or cause to be discharged, in any waters of the state any manure, pollutants, or stormwater resulting from an animal feeding facility in excess of the permissive discharges specified under an existing permit.

(D) On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director of agriculture under section 903.08 of the Revised Code, no person shall discharge pollutants from a concentrated animal feeding operation into waters of the state unless authorized by a valid and unexpired NPDES permit issued by the director or unless an application for renewal of such NPDES permit has been submitted by the person and is pending.

(E) Any person who discharges or proposes to discharge pollutants shall apply for a NPDES permit. A concentrated animal feeding operation proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur.

(F) On and after the date on which the United States environmental protection agency approves the NPDES program submitted by the director, no person shall discharge stormwater resulting from an animal feeding facility unless authorized by a NPDES permit when such a permit is required by the act and subsequently issued by the director of agriculture pursuant to section 903.08 of the Revised Code.

(G) No person shall violate the terms and conditions of a permit to install, permit to operate, review compliance certificate, or NPDES permit.

(H) No person shall violate any effluent limits established by rule.

(I) No person shall violate any other provision of a NPDES permit issued by the director.

R.C. 119.032 review dates: 03/21/2014 and 03/21/2019
Promulgated Under: 119.03
Statutory Authority: 903.08, 903.10
Rule Amplifies: 903.01, 903.02, 903.03, 903.04, 903.05, 903.07, 903.08, 903.081, 903.082, 903.09, 903.10
Prior Effective Dates: 9/1/2011, 1/23/2009, 9/15/2005, 7/2/2002

Ohio Department of Agriculture 62

Governor Bob Taft
Lieutenant Governor Maureen O'Connor
Director Fred L. Dailey

Livestock Environmental Permitting Progra
8995 East Main Street • Reynoldsburg, Ohio 430
Phone: 614-387-0470 • Fax 614-728-63.
ODA home page: www.state.oh.us/agr/ • e-mail: agri@odant.agri.state.oh.

Certified Mail Return Receipt Requested

February 10, 2004

(b) (6) Poultry Farm
(b) (6)
Fort Recovery, Ohio 45846

Re: Warning Letter

Dear Mr. and Mrs. (b) (6):

Violation of Ohio Department of Agriculture laws and rules was discovered during an inspection by my staff on November 26, 2003. On that date, staff from the Ohio Department of Agriculture Livestock Environmental Permitting Program investigated a complaint that tiles on your farm were flowing and that you had a discharge from land applying egg wash water to a field. I understand that your lagoon was getting full and that you found it necessary to land apply manure. No records were available on freeboard measurements.

The inspection noted that the lagoon was approximately ¾ empty. The tile was plugged and the waterway was dammed. There was a trace of red left in the ditch from the egg wash water, but it was mostly clear. The discharge was taken care of but a discharge occurred. It appeared to the inspector that the discharge flowed into a defined waterway or "waters of the State" in violation of your Ohio EPA Permit to Install, which is now enforced by this Department.

The following are the rules at issue:

Rule 901:10-2-14 of the Ohio Administrative Code provides, in part, at (B) Manure application rate – general criteria:

> "(3) The manure application rate shall be based on the most limiting factor of the following:
>
> "(a) For liquid manure:
>
> * * * * * *
>
> " (iv) The application rate shall not exceed the available water capacity of the soil as described in appendix B of this rule: ..."

You are currently subject to Ohio EPA Permit to Install 08-044-NW which was transferred to this Department for enforcement on August 19, 2001. As required by law, you are working to obtain a Review Compliance Certificate that will regulate your farm under ODA rules and under those portions of the Ohio EPA permit that do not conflict with any ODA rules. Some of the conditions of the Ohio EPA permit required monitoring and reporting. With the RCC you will find that ODA rules also require monitoring and recordkeeping. Records need to be maintained in good order in an Operating Record that is always available to an inspector. I want to take this opportunity to note the requirements that apply with respect to land application activities at a facility such as yours. The applicable rule is 901:10-2-16 of the OAC and it provides, in part at paragraph (A)(1)(c):

> " Land application site records. Records for each land application site, including:
>
> * * * * *
>
> "(iii) When liquid manure is applied to a land application site with subsurface drains, document the periodic observations of the drain outlets for liquid manure flow during and after application in the operating record.
>
> "(iv) When liquid manure is applied to a land application site with subsurface drain, document the use of drain outlet plugs or other devices in the operating record."

A copy of Appendix B, which is referred to in the rules, is included here for your use along with a copy of the Complaint Follow-Up Report.

You must contact this office prior to any land application of manure because of winter conditions. In the meantime, my staff will continue to work with you to develop a Review Compliance Certificate for your facility.

Sincerely,

Kevin H. Elder
Executive Director
Livestock Environmental Permitting Program

Enclosures (2)

Cc: Andy Ety, LEPP Engineer
Michelle McKay, LEPP Inspector
Jennifer Tiell, Legal Counsel
John L. Shailer, Assistant Attorney General
Mercer County SWCD
Rick Wilson, Ohio EPA

Governor Bob Taft
Lieutenant Governor Maureen O'Connor
Director Fred L. Dailey

Livestock Environmental Permitting Program
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ODA home page: www.state.oh.us/agr/ • e-mail: agri@odant.agri.state.oh.us

June 4, 2004

Certified Mail Return Receipt Requested

(b) (6)
Rossburg, Ohio 45362
Attention: (b) (6)

Re: Warning Letter

Dear (b) (6):

Violation of Ohio Department of Agriculture laws and rules was discovered during an inspection by my staff on May 24, 2004. On that date, staff from the Ohio Department of Agriculture Livestock Environmental Permitting Program investigated a complaint about flies from your facility. The ODA inspector found that insects were well under control and the facility is well kept. However, we find that WB Poultry is not complying with the Permit to Install (PTI) issued to (b) (6), WB Poultry on September 25, 1998.

Section 903.04 of the Ohio Revised Code provides as follows at (B):

> " On and after the date on which the director of agriculture has finalized the program required under division (A)(1) of section 903.02 of the Revised Code, the authority to enforce terms and conditions of installation permits that previously were issued to animal feeding facilities shall be transferred from the director of environmental protection to the director of agriculture. Thereafter, the director of environmental protection shall have no authority to enforce the terms and conditions of those installation permits. On and after the date on which the director of agriculture has finalized the program required under division (A)(1) of section 903.02 of the Revised Code, an installation permit concerning which enforcement authority has been transferred shall be deemed to have been issued under this section."

The Director of the Ohio Department of Agriculture finalized the program to regulate concentrated animal feeding facilities on August 19, 2002. On that date, all PTIs issued by Ohio EPA were transferred to this Department for enforcement.

Our files show that Ohio EPA issued Notice of Violation letters to you dated July 30, 2001 and December 13, 2001. In addition, and as documented in inspection reports dated February 10, 2004 and May 24, 2004, ODA staff finds that WB Poultry is still not complying the PTI. The special conditions in the Ohio EPA PTI for annual manure sampling have not been fulfilled. Special condition 16 of the PTI required insect control measures, including record keeping on the use of fly cards, inspections conducted, and other visual monitoring. This documentation is missing. In short, the PTI required documentation from you of specific operations at your facility and you have not complied with these requirements.

All of the record keeping requirements in your Ohio EPA PTI may also be found in rules 901:10-2-10, 901:10-2-16, and 901:10-2-19 of the Ohio Administrative Code. Any authorization to operate a concentrated animal feeding facility in Ohio will require compliance with these rules. Your immediate attention to this matter is required. If, at the time of your next inspection, your records have not improved, I will recommend enforcement to the Director, including an assessment of a penalty.

Sincerely,

Kevin H. Elder,
Executive Director, Livestock Environmental Permitting Program

Cc: Andy Ety, LEPP Engineer
Michelle McKay, LEPP Inspector
Jennifer Tiell, Legal Counsel, Ohio Department of Agriculture
Tim Brunswick, Darke SWCD
Cathy Alexander, Ohio EPA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

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APR 04 2007

REPLY TO THE ATTENTION OF:

Robert J. Boggs, Director
Ohio Department of Agriculture
8995 East Main Street
Reynoldsburg, Ohio 43068-3399

Dear Mr. Boggs:

I am writing in response to a December 28, 2006, letter from former Governor Taft in which the State of Ohio asked the United States Environmental Protection Agency (U.S. EPA), Region 5, to approve a revision to the Ohio National Pollutant Discharge Elimination System (NPDES) program. As you know, this revision involves a transfer of the program element for concentrated animal feeding operations (CAFOs) from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture (ODA). It includes amendments to Ohio's statutory and regulatory framework for preventing water pollution from CAFO manure, litter, and process wastewater.

We are committed to working with ODA to process this request as expeditiously as possible, and to resolve any deficiencies. As part of our review, we have identified an initial list of questions and concerns about the revised program (enclosed). The questions and concerns are focused on land application of manure and wastewater issues. They were briefly noted in a December 19, 2006, letter from this office to Mr. Kevin Elder of ODA and Mr. George Elmaraghy of Ohio EPA. These initial concerns must be resolved, or they may prevent U.S. EPA, Region 5, from approving the revised program. Please respond to the initial questions in writing, so that we can better understand ODA's land application standards. We may identify additional questions and concerns as our review progresses.

Thank you in advance for your responses. We will contact Mr. Elder to continue discussions in an effort to resolve the concerns. A meeting, such as the one requested in your March 20, 2007, letter to Regional Administrator Mary A. Gade, will also provide an opportunity for our two agencies to resolve concerns. I anticipate that we will respond to your March 20, 2007, letter in the near future.

Thank you for the opportunity to review the Ohio revised program. Do not hesitate to contact me if you have any questions.

Sincerely yours,

Jo Lynn Traub
Director, Water Division

Enclosure

cc: Chris Korleski, Director, Ohio EPA
Mr. Kevin Elder, ODA
Mr. George Elmaraghy, Ohio EPA

Enclosure

Questions

1. The Effluent Limitations Guidelines and New Source Performance Standards for the concentrated animal feeding operations (CAFO) point source category, 40 CFR part 412, prohibit dry-weather discharges of manure, litter, and process wastewater (manure) from land application areas under the control Large CAFOs in the cattle, swine, poultry, and veal subcategories. *See*: 71 *Federal Register* 37769, June 30, 2006. Does chapter 903 of the Ohio Revised Code or chapter 901 of the Ohio Administrative Code require National Pollutant Discharge Elimination System (NPDES) permits to be issued by the Ohio Department of Agriculture (ODA) to prohibit discharges from land application areas when such discharges are not agricultural storm water as defined in rule 901:10-1-01(D)?

2. Rule 901:10-2-14(C)(1)(d) provides that the rate of liquid manure application shall not exceed the available water capacity as described in appendix B of rule 901:10-2-14. When soil moisture is at or above field capacity, appendix B does not identify liquid amounts required to reach the available water capacity. Does rule 901:10-2-14(C)(1)(d) prohibit liquid manure application when soil moisture equals or exceeds field capacity?

3. Rule 901:10-2-14(C)(1)(e) requires CAFO owners or operators to adjust the application rate for liquid manure to avoid surface ponding and/or runoff. Rule 901:10-2-14(G)(1)(c) allows owners or operators to apply 5,000 gallons (gal) of liquid manure on an acre of frozen ground. When ground is frozen but not covered with snow, which rule governs for the purpose of limiting the rate at which liquid manure may be applied?

4. Rule 901:10-2-14(C)(3) provides that land application of manure shall comply with all restrictions in appendix A of rule 901:10-2-14 unless a compliance alternative is submitted in the manure management plan and approved by the director. Does the allowance for compliance alternatives extend only to the setbacks in appendix A, table 2, of rule 901:10-2-14 or does it extend to all of the best management practices in appendix A of rule 901:10-2-14?

5. The federal regulation at 40 CFR § 412.4(c)(5) contains a 100-foot setback applicable to manure application near conduits to surface water[1]. Ohio rule 901:10-2-14(C)(3) (incorporating appendix A, table 2, by reference) does not expressly incorporate a setback applicable to conduits to surface water. However, it does incorporate a setback applicable to surface waters of the State. Are roadside ditches included within the meaning of the term surface waters of the State as that term is used in rule 901:10-2-14 (C)(3)?

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[1] As compliance alternatives, the regulation provides that a CAFO owner or operator may substitute a 35-foot vegetative buffer or demonstrate that a setback or buffer is not necessary because conservation practices or field conditions provide pollutant reductions equivalent to or better than a 100-foot setback.

6. Rule 901:10-2-14(C)(3) (incorporating appendix A, table 2, by reference) contains a 35-foot setback applicable to surface application of manure near field surface furrows. Rule 901:10-1-01 defines a field surface furrow as "an area of … concentrated surface water runoff [that] … is not a river, stream, ditch, or grassed waterway. Field surface furrows are areas that are normally planted with crops each year." A December 22, 2006, memorandum from Kevin Elder to Jo Lynn Traub indicates that such furrows are "derived from the [Ohio] Natural Resources Conservation Service (NRCS) Conservation Practice Standard 607, which was developed to be used predominantly in Northwest Ohio to remove standing water from crops during the growing season. The systems are usually made up of small, temporary lateral surface furrows that convey water to main surface drains (collectors)." Has Ohio NRCS or Ohio State University published criteria applicable to the design and construction of field surface furrows? If so, please provide a copy of the published criteria. If not, please provide ODA's design and construction criteria if they exist.

7. Rule 901:10-2-14(D)(2)(b) requires the owner or operator to subtract the nitrogen credit for crop residue, legumes, and other sources of nitrogen to be given to the next corn crop. Are credits from prior applications of manure included within the meaning of "other sources of nitrogen" as these words are used in rule 901:10-2-14(D)(2)(b)? Please see 68 *Federal Register* 7211, February 12, 2003.

8. Rule 901:10-2-14(D)(2)(b) expressly requires the owner or operator to subtract credits to be given to the next corn crop. Does it or any other rule require the owner or operator to subtract credits to be given to the next crop other than corn? If a rule other than rule 901:10-2-14(D)(2)(b) requires credits to be given to the next crop other than corn, please identify the rule.

9. Rule 901:10-2-14(D)(5) provides that the criteria applicable to manure application and the requirements of paragraph (D) of rule 901:10-2-14 may be changed if the owner or operator can demonstrate nutrient insufficiency to the director. Do the words "criteria applicable to manure application," as used in paragraph (D)(5) of rule 901:10-2-14, refer to all of the criteria in rule 901:10-2-14 or only the criteria in rule 901:10-2-14(D)(1) through (4)?

10. Rule 901:10-2-14(E)(3)(b) provides that application of phosphorus shall not occur on land with soil tests over 150 parts per million (ppm) Bray P1 or equivalent unless an owner or operator can demonstrate an alternative to the director through use of the phosphorus index risk assessment procedure contained in appendix E, table 1, of rule 901:10-2-14. Are all such alternative applications subject to the applicable prohibition or limitation in the *Generalized Interpretation of Phosphorus Index & Management* column in appendix E, table, 1, of rule 901:10-2-14?

11. Rule 901:10-2-14(E)(3)(c) provides that phosphorus applications between 250 and 500 pounds (lbs) per acre may be made if the values for liquid manure exceed 60 lbs per 1,000 gal and if the values for solid manure exceed 80 lbs per ton. Is the allowance in

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rule 901:10-2-14(E)(3)(c) subject to any more stringent nitrogen limitation derived under rule 901:10-2-14(D)?

12. Rule 901:10-2-14(E)(3)(b) provides that an owner or operator shall not apply phosphorus on land with soil tests over 150 ppm Bray P1 or equivalent unless the owner or operator can demonstrate an alternative through use of the Ohio phosphorus index procedure. However, rule 901:10-2-14(E)(3)(d) provides that, "[N]otwithstanding the procedures in paragraph (E)(3)(a) or (E)(3)(b) of this rule ..., for a single phosphorus application in a year, the application rate shall not exceed five hundred pounds per acre of phosphorus." Are manure applications conducted in accordance with rule 901:10-2-14(E)(3)(d) subject to any more stringent prohibition or limitation derived under rule 901:10-2-14(E)(3) or rule 901:10-2-14(E)(3)(b)?

13. Rule 901:10-2-14(G)(1)(a) provides that prior approval for surface application of manure on frozen or snow-covered ground shall be obtained from the director or his or her representative. On what basis will the director or his or her representative grant or deny such a[n] approval?

14. Rules 901:10-2-14(G)(1)(b) and (c) provide that the rate of application on frozen or snow-covered ground is limited as follows: 10 tons per acre (solid manure with more than 50 percent moisture), five tons per acre (solid manure with less than 50 percent moisture), and 5,000 gal per acre (liquid manure). The limitations in these rules are not expressed in units of time. Will ODA determine compliance with the limitations during each discrete period of time during which ground is frozen or snow-covered or will ODA determine compliance on a cumulative basis for all periods in a winter during which ground is frozen or snow-covered? For example, if a winter includes three periods during which ground is frozen or snow-covered, could an owner or operator apply 5,000 gal of liquid manure per acre during each period, for a cumulative rate of 15,000 gal per acre, or would he or she be limited to 5,000 gal per acre in total?

Concerns

1. The federal regulation at 40 CFR § 412.4(c)(5) contains a setback applicable to manure application near downgradient open tile line intake structures. Ohio rule 901:10-2-14(C)(3) (incorporating appendix A, table 2, by reference) does not contain a setback applicable to such structures.

2. The regulation at 40 CFR § 412.4(c)(5) contains a 100-foot setback applicable to manure application near downgradient conduits to surface water. As compliance alternatives, the regulation provides that a CAFO owner or operator may substitute a 35-foot vegetative buffer or demonstrate that a setback or buffer is not necessary because conservation practices or field conditions provide pollutant reductions equivalent to or better than a 100-foot setback. Ohio rule 901:10-2-14(C)(3) (incorporating appendix A, table 2, by reference) contains a 35-foot setback applicable to surface application near field surface furrows. In a December 22, 2006, memorandum from Kevin Elder to

Jo Lynn Traub, ODA contends that the 35-foot setback is a compliance alternative as allowed under the federal regulations. ODA has not provided data and information that a CAFO owner or operator could use to demonstrate that ODA's 35-foot setback provides pollutant reductions equivalent to or better than a 100-foot setback.

3. Rule 901:10-2-14(E)(3) requires CAFO owners and operators to land apply no more manure than allowed in appendix E, table 2. When the phosphorus soil test level is between 100 and 150 ppm Bray P1 or equivalent, Appendix E, table 2, provides that manure shall be applied so as not to exceed the nitrogen requirement or removal for the next crop. It also provides that a single application of the manure phosphorus required by crops to be planted over several years is authorized provided that the field has more than 50 percent ground cover at the time of application or the manure is incorporated within seven days.

According to the Ohio NRCS (2001) and Ohio Environmental Protection Agency (Ohio EPA) (2005), a high potential for phosphorus transport to surface water exists when a CAFO owner or operator uses a soil test to assess the risk of transport and the results show 100 or more ppm of phosphorus in the soil. ODA agreed with Ohio NRCS and Ohio EPA on this point before 2007 (*see*: Ohio Administrative Code 901:10-2-14, appendix E, table 2 (2006)).

Application of manure in excess of crop nutrient requirements increases the pollutant runoff from fields because the crop does not need these nutrients. In areas that have high phosphorus buildup in soil, allowing application at a nitrogen-based rate or multi-year phosphorus-based rate could allow continued discharge of phosphorus. U.S. EPA recognizes that inherent site conditions, conservation practices, and management practices may, in aggregate, reduce field vulnerability to phosphorus transport to surface water. While the Ohio phosphorus index accounts for all of the relevant potentially mitigating conditions and practices, appendix E, table 2 (2007), does not. When soil test phosphorus levels are high (i.e., between 101 and 150 ppm inclusive in the present instance), U.S. EPA, Region 5, is concerned that the appendix E, table 2 (2007), allowance for application at a nitrogen-based rate or multi-year phosphorus-based rate will not minimize phosphorus movement to surface waters as required under 40 CFR § 123.36.

4. Rule 901:10-2-14(C)(6) provides that the owner or operator shall not land apply manure if the forecast predicts a greater than 50 percent chance of more than one-half inch of rain for a period extending to 24 hours after the start of an intended land application event.

U.S. EPA, Region 5, evaluated this Ohio rule to determine whether it will prevent precipitation-related discharges when rain is forecast to occur within 24 hours after an intended manure surface application event. Such an evaluation is supported by 40 CFR § 123.36 (requiring technical standards for nutrient management to address, in part, the timing of land application to minimize nutrient movement to surface waters) and section 4.1.2.4 of the *NPDES Permit Writers' Guidance Manual and Example NPDES Permit for*

Concentrated Animal Feeding Operations (U.S. EPA 2003) (providing that technical standards for nutrient management should prohibit surface application when rain is expected soon after a planned application in an amount that may produce runoff). It is consistent with the Ohio NRCS Conservation Practice Standard for Nutrient Management (2003) (providing that CAFO owners and operators should delay manure application if precipitation capable of producing runoff is forecast within 24 hours of the planned application).

We prepared the attached tables as part of the evaluation. The tables are based on NRCS (1997, 1986) and Soil Conservation Service (SCS) (1972). Procedures in these references account for soil moisture before a rainfall event of interest. The moisture categories are dry (antecedent moisture condition (AMC) I), average (AMC II), and saturated (AMC III). For the purpose of our evaluation, we assumed that CAFO owners and operators will refrain from surface applying solid manure when soil moisture is classified as AMC III, due to possible trafficability problems. With regard to surface application of liquid manure when soil is saturated, we assumed that ODA will answer question 2., above, in the affirmative (i.e., answer that rule 901:10-2-14(C)(1)(d) prohibits liquid manure application when soil moisture is at or above field capacity).

As indicated in the tables, the precipitation amount in the Ohio rule should prevent almost all near-term precipitation-related discharges when soil moisture before a likely rainfall event is classified as AMC I. It should prevent many near-term precipitation-related discharges when soil moisture before a likely event is classified as AMC II and the predominant soil within the land application area is classified as hydrologic soil group (HSG) A or B. However, the precipitation amount in the Ohio rule is not likely to prevent most near-term precipitation-related discharges when soil moisture before a likely event is classified as AMC II and the predominant soil within the land application area is classified as HSG C or D. This is a cause for concern in as much as such discharges may kill fish or otherwise adversely affect surface water quality but nevertheless qualify for the permit shield under 33 U.S.C. § 1342(k) or the agricultural storm water discharge exclusion under 33 U.S.C. § 1362(14) and Ohio rule 901:10-2-14.

A December 22, 2006, memorandum from Kevin Elder to Jo Lynn Traub does not allay this concern. In it, ODA said that it need not include a rainfall amount less than one-half inch for HSG C and D soils under AMC II principally because (1) Ohio rule 901:10-2-14(C)(1)(d) limits applications of liquid manure to the amount which will increase soil moisture to the available moisture capacity and (2) several variables determine whether precipitation will cause runoff. U.S. EPA, Region 5, does not agree that Ohio rule 901:10-2-14(C)(1)(d) will prevent a discharge from a HSG C or D soil in the event of near-term precipitation less than one-half inch. As it is, a likely outcome of a liquid manure application in compliance with rule 901:10-2-14(C)(1)(d) would be to increase soil moisture from AMC I or II to AMC III. As indicated in the attachment, as little as 0.22 or 0.15 inch of rain is required to produce runoff from HSG C or D soils, respectively, when soil moisture before the event is classified as AMC III and dense residue or canopy cover is present. Separately, we note that NRCS (1997, 1986) and SCS (1972) account for most of the variables which are relevant to determining whether rain

will cause runoff. The variables include soil type, the presence or absence of subsurface drains, cover type, and treatment practices (including residue management).
The NRCS/SCS references do not account for the effect of soil temperature on runoff generation.)

Attachment

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S. HRG. 109–1046

EPA REGIONAL INCONSISTENCIES

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 28, 2006

Printed for the use of the Committee on Environment and Public Works

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ties subject to environmental regulations or of environmental interest, and uses Agency data standards to integrate information from multiple sources giving a unique identifier. Using FRS, the overall number of regulated entities is approximately 1.5 million, and these records are linked with permit or environmental interest records in Permit Compliance System (PCS), Air Facility System (AFS), Resource Conservation and Recovery Act Information (RCRAInfo), Integrated Compliance Information System (ICIS), Safe Drinking Water Information System (SDWIS) and multiple other systems. OECA regularly updates its ICIS and the Integrated Data for Enforcement Analysis (IDEA) system using FRS data on regulated entities. As FRS makes system and data changes, OECA will adapt in response.

RESPONES BY GRANT NAKAYAMA TO ADDITIONAL QUESTIONS FROM SENATOR VOINOVICH

Question 1. Does Region V intend to approve Ohio's request to transfer the National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations (CAFO) permitting to the Ohio Department of Agriculture? Why or why not?

It is my understanding that the Ohio Department of Agriculture has been in communication/consultation with Region V while developing this package. Can Region V make a determination in 6 months or even 3 months?

Response. Ohio has not asked Region V to approve a revision to the Ohio National Pollutant Discharge Elimination System (NPDES) program to transfer the concentrated animal feeding operations (CAFOs) element from the Ohio Environmental Protection Agency to the Ohio Department of Agriculture. The Region would approve a revised program that meets the requirements the Clean Water Act and the Code of Federal Regulations (CFR). Federal regulations allow two or more State agencies to share NPDES authority and the Act and regulations contemplate EPA approval of revised programs that meet the applicable requirements.

Region V and EPA's Office of Water have been providing advice and assistance to help Ohio revise its program. We anticipate requiring 6 months to make a decision once Ohio submits a request with appropriate documentation. This period will include an opportunity for the people of Ohio to comment. It would be difficult to make a decision in a shorter period of time while giving the people of Ohio a chance to participate and fulfilling our obligations under the Act.

Question 2. Over the years, EPA has published numerous guidance manuals that provide valuable information for the industry to consider voluntarily complying. It is the observation of some that—at times—the guidance documents are treated as law, though the first page of one such document entitled "Managing Manure Nutrients at Concentrated Animal Feeding Operations December 2004" States "This is a guidance document and is not a regulation. It does not change or substitute for any legal requirements the obligations of the regulated community are determined by the relevant statutes, regulations, or other legally binding requirements. This guidance manual is not a rule, is not legally enforceable, and does not confer legal rights or impose legal obligations upon any member of the public, EPA, States, or any other Agency. In the event of a conflict between the discussion in this document and any statute or regulation this document would not be controlling. The word 'should' in this document does not connote a requirement, but does indicate EPA's strongly preferred approach to assure effective implementation of legal requirements."

Has Region V or any region ever used the failure of a State to comply with such guidance, which is not law, as the basis to reject State proposed standards or informed States that if they do not incorporate such guidance documents and standards in the development of regulations, that it is likely that the new regulations will not be approved, even if they meet Code of Federal Regulations (CFR) requirements?

If, for example, a State like Ohio decides to use a practice approved by the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS), such as practice standards 633 for application of waste versus EPA's guidance as outlined in Appendix L of the "Managing Manure Nutrients at Concentrated Animal Feeding Operations" Guidance Document, would EPA's regional office deny the Ohio Department of Agriculture package to transfer the National Pollutant Discharge Elimination System permitting authority from Ohio EPA to the Ohio ODA?

Response. The Region has not rejected State proposed standards that meet Clean Water Act and CFR requirements. Region V is working with Ohio EPA, Ohio Department of Agriculture, USDA Ohio Natural Resources Conservation Service (NRCS) and other partners to resolve issues related to the Ohio NRCS Waste Utilization Standard (633) for application of wastes from agricultural livestock oper-

ations. We would approve a revised Ohio program that meets the requirements of section 402(b) of the Clean Water Act and 40 CFR part 123.

Question 3. Under EPA's CAFO rule, what is the definition of "discharge?" Do all regions share the same definition? How do you interpret this definition to apply to livestock farms?

Response. EPA's CAFO rule does not define "discharge." The Clean Water Act includes concentrated animal feeding operations (CAFOs) in the definition of the term "point source." Section 502(12) defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." All EPA Regions share this definition. EPA's preamble to its proposed, revised CAFO rule recognizes that some CAFOs have a higher likelihood of discharging and suggests that large CAFOs falling into certain categories consider seeking permit coverage. EPA is seeking comments on the completeness and accuracy of the preamble list of situations where a discharge may occur.

Question 4a. There is a constant push within the States to be faster in issuing permit authorizations. Businesses demand the ability to meet changing consumer demands by making quick modification or changes to their plants and facilities. Associated with this pressure is the desire by business to work within construction seasons to meet their time frames for completion of projects. Businesses push States to allow as much construction of new or modified facilities prior to receiving final permits. Unfortunately, the U.S. EPA has been inconsistent in how much construction it will allow prior to receiving either a water or air permit for a new facility. Many States seem to allow significant amounts of construction prior to final issuance of permits. Meanwhile, in States like Ohio, I understand Region V has issued letters and taken enforcement actions against facilities that initiated construction prior to receiving final permits. For example, Indiana has a State rule that allows significant amount of construction prior to receipt of a final air permit. I understand that when Ohio inquired about that rule the U.S. EPA indicated that they would not approve another rule like that in another State. The U.S. EPA should be consistent in the standard it holds States to relative to pre-permit construction activities. A lack of consistency can put States that are more conservative in what they will allow at a competitive disadvantage to neighboring States.

Response. The Clean Air Act and implementing regulations for construction permitting set minimum requirements for permitting programs, but do not require that they all be the same. This preserves State flexibility to tailor programs to meet their own circumstances, as long as they meet the Clean Air Act minimum requirements. The minimum requirements assure that proposed changes at sources that could have an adverse impact on air quality are available for public and Agency review and are permitted prior to initiation of on-site construction activities. EPA strives to preserve States' flexibility, but must assure that minimum requirements are met.

The requirements for allowable pre-construction activity provide flexibility for minor sources of air pollution, but allow very limited pre-permit construction for major sources. Within this framework, EPA has worked to assure a consistent approach to approving State permit requirements. The Indiana rule you discuss is currently being reviewed by EPA and we will consider consistency as we complete our analysis and finalize our determination.

Question 4b. All the States should be held to similar requirements when it comes to public participation in permitting actions. It appears that permits are issued in some States with almost no public participation while others have more intensive involvement. If States are simply implementing Federal requirements for public involvement, then those requirements should be clearly identified and enforced across all regions. Otherwise, States with more involved public participation will be at a competitive disadvantage because they will have longer permitting processing time frames.

Response. As noted above, the Act and EPA regulations spell out the minimum elements of a permitting program. State approaches to public participation need not be identical, particularly for smaller sources, where the regulations allow for various approaches that have evolved over many years of State permitting experience.

For example, all States in EPA Region V require full public participation for construction actions that trigger Federal air permitting requirements. EPA is not aware of any States that exclude all minor actions from public participation. However, EPA has approved various de minimis emission levels below which minor sources can be exempt from public participation requirements. When States have established public participation threshold levels, EPA analyzes such requirements for consistency with other States.

EPA has become aware of some concerns with existing State rules that may not meet minimum requirements for public participation. We agree that this could

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BOB GIBBS
18TH DISTRICT, OHIO

TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
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September 16, 2011

Administrator Lisa Jackson
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: *U.S. EPA Approval of Transfer of Regulatory Authority from Ohio EPA to ODA*

We would respectfully request the approval to transfer regulatory responsibility over the Ohio National Pollutant Discharge Elimination System (NPDES) program from the Ohio Environmental Protection Agency (Ohio EPA) to the Ohio Department of Agriculture (ODA). It is our understanding that transfer of this authority over concentrated animal feeding operations and storm water from animal feeding operations was set into motion with the Clean Water Act (CWA) and has been in process for over four years.

In 2001, Ohio passed legislation to transfer state NPDES permitting authority over concentrated animal feeding operations (CAFOs) from Ohio EPA to ODA. That same year, Ohio informally notified U.S. EPA about this desired state program change, and ODA passed its first CAFO NPDES rules a year later in 2002.

In 2007, the ODA formally applied for the transfer of authority and, over the past four years, the department has responded to numerous requests from U.S. EPA for statutory and regulatory revisions and changes that would ultimately authorize the NPDES transfer. Despite all of these best efforts, the transfer still has not culminated due to even more requests for revisions.

In October 2008, U.S. EPA Region 5 notified the public that it was proposing to approve Ohio's request to transfer the state's NPDES program for CAFOs to ODA pending Ohio's approval of the additional rule and statutory changes. Ohio's legislature moved swiftly to adopt these changes hoping it would be the last step necessary to obtain the approval of the transfer.

In May 2011, the ODA initiated a fifth rulemaking process to respond to any EPA comments and to prepare for any updates or changes necessitated by U.S. EPA's revisions. This request has remained pending during the administration of three Ohio governors; two Republicans and one Democrat, and has yet to be approved. During this whole process, ODA has continued to work closely with Ohio EPA in preparing for the transfer of the CAFO NPDES authority between the two state agencies.

There are a number of reasons to prompt a decision from U.S. EPA to approve the transfer of authority:

- ODA's state-only permits (Permit to Install and Permit to Operate) are more comprehensive in the scope of regulatory requirements over permitted activities of CAFOs than permits previously issued by Ohio EPA.
- Approval of Ohio's request will allow Ohio EPA to re-direct its resources toward other sources of water pollution.
- ODA has a larger staff for engineering, inspections, communications and legal support than Ohio EPA ever employed for environmental oversight over livestock facilities.
- The ODA staff is trained in agricultural engineering, agronomy, animal science, water quality, insect and rodent control and has the expertise that is required to prevent environmental problems.
- Ohio still has duplicative and overlapping permit programs that can only be eliminated if U.S. EPA authorizes ODA to issue and enforce NPDES permits along with the state-only permits.
- This transfer will allow ODA to deliver a more comprehensive regulatory program that is protective of the environment.
- This is a sensible re-distribution of regulatory work between two state agencies.
- Permitted farm owners/operators would be working with the same staff for both the NPDES permits and state-only permits, making the permit process and communications more uniform and predictable.

There is precedent that authority can, and has been, shared between state agencies in other federal environmental programs. The Ohio program for the Underground Injection Control Program established pursuant to Sections 1422 and 1425 of the Safe Drinking Water Act is administered by the Ohio Department of Natural Resources and the Ohio EPA, with both programs authorized by U.S. EPA. Similarly, the Resource Conservation and Recovery Act of 1976, 90 Stat. 2806, 42 U.S.C. 6921, as amended, is implemented in Ohio by two cabinet-level departments: the Ohio EPA for hazardous waste regulation and the Ohio Department of Commerce State Fire Marshal's Office for underground storage tanks. U.S. EPA has also recognized the ODA as an effective regulator in another environmental program area. The ODA has been in charge of Ohio's regulatory and enforcement programs under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for over thirty years.

We are confident that the State of Ohio has provided sufficient documentation for the EPA to determine that the Ohio Department of Agriculture possesses adequate authority to implement the proposed NPDES program in accordance with CWA section 402(b) and 40 C.F.R. Part 123.

We look forward to receiving notification of the U.S. EPA's timely approval.

Bob Gibbs
Member of Congress

Jim Jordan
Member of Congress

Jean Schmidt
Member of Congress

Jim Renacci
Member of Congress

Bob Latta
Member of Congress

Steve Chabot
Member of Congress

Bill Johnson
Member of Congress

Patrick Tiberi
Member of Congress

Federal Requirement/ Citation	State Citation	State Requirement	Comment
40 CFR PART 122 EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM			
40 CFR § 122.21 Application for a permit.			
122.21(a)			
* * *			
122.21(a)(1) * * * The requirements for concentrated animal feeding operations are described in § 122.23(d).			
122.21(a)(2) * * *	ORC 903.08(D)	(D) In accordance with rules, an applicant for a NPDES permit issued under this section shall submit a fee in an amount established by rule together with, except as otherwise provided in division (F) of this section, an application for the permit to the director of agriculture on a form prescribed by the director. The application shall include any information required by rule.	While not specifically referencing form 1, the rules, as noted under 40 CFR 122.21(a)(2)(I)(A) below, require submission of the same information contained in form 1 on forms approved by the Director of ODA. Current versions of the forms are available online at http://www.agri.ohio.gov/divs/LEPP/Lepp.aspx under the "Forms" sublink.
122.(a)(2)(I) * * * Applications for EPA-issued permits must be submitted as follows:	ORC 903.10(F)	The director of agriculture may adopt rules in accordance with Chapter 119. of the Revised Code that do all of the following: (F) Establish all of the following concerning NPDES permits: . . . (5) Procedures for the submission of applications for permits and notices of intent to be covered by general permits, including information that must be included in the applications and notices; . . . The rules adopted under division (F) of this section shall be consistent with the requirements of the Federal Water Pollution Control Act.	
122.21(a)(2)(I)(A) All applicants, other than POTWs and TWTDS, must sul Form 1.	OAC 901:10-1-02(A)(3), (A)(8), A)(9)	An application for a permit to install, a permit to operate, or a NPDES permit to be deemed complete, must include: (3) All required information as set forth in Chapter 901:10-2 and, if applicable, Chapter 901:10-3 of the Administrative Code, and shall accompany the application; and . . . (c) Any supplemental information which is completed to the satisfaction of the director. . . . (8) A certification statement as follows: . . . . (9) A complete application is required. (a) Any person who requires a permit shall complete, sign, and submit to the director an application for each permit required. (b) The director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for the permit. (c) Permit applications must comply with the signature and certification requirements of this rule. . . .	Text has been significantly abridged for purposes of the cross-walk.
	OAC 901:10-1-02(D)	(D) NPDES permit. (1) Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by a general permit under Chapter 901:10-4 of the Administrative Code, must submit a complete application to the director in accordance with this rule and Chapter 901:10-2 of the Administrative Code. . . .(5) Applicants for concentrated animal feeding operations must submit form 2B.	
	OAC 901:10-3-01(C)	(C) Any person who discharges or proposes to discharge pollutants and who does not have an effective NPDES permit, except persons covered by a general NPDES permit, must submit a complete application to the director in accordance with this rule. The director shall not issue a NPDES permit before receiving a complete application for a NPDES permit except NPDES general permits. An application for a NPDES permit is complete when the director receives an application form and any supplemental information which are completed to his or her satisfaction. All applicants for NPDES permits must provide the following information to the director: . . .	Test has been significantly abridged for purposes of the cross-walk; see OAC 901:10-3-01 for full list of information applicants must provide.
122.21(a)(2)(I)(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B	OAC 901:10-1-02(D)(5)	(5) Applicants for concentrated animal feeding operations must submit form 2B.	
122.21(I) * * * New and existing concentrated animal feeding operations. . . shall provide the following information to the Director, using the application form provided by the Director:	ORC 903.08, 903.10(F); OAC 901:10-1-02, 901:10-3-01(C)	Must use forms approved by ODA - see language above.	Information listed below is also required on the application forms. Current versions of the forms are available online at http://www.agri.ohio.gov/divs/LEPP/Lepp.aspx under the "Forms" sublink.

practices, or operations regulated or required under this permit; and 40CFR 122.41

(4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

(j) *Monitoring and records.* (1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi).The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

(k) *Signatory requirement.* (1) All applications, reports, or information submitted to the Director shall be signed and certified. (See §122.22)

(2) The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

(l) *Reporting requirements*—(1) *Planned changes.* The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is required only when:

(i) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in §122.29(b); or

(ii) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants which are subject neither to effluent limitations in the permit, nor to notification requirements under §122.42(a)(1).

(iii) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: December 13, 2004 Decided: February 28, 2005)

Docket Nos. 03-4470 (L), 03-4621 (C), 03-4631 (C), 03-4641 (C), 03-4849 (C), 04-40199 (C), 03-40229 (C)

WATERKEEPER ALLIANCE, INC., AMERICAN FARM BUREAU FEDERATION, NATIONAL CHICKEN COUNCIL, NATIONAL PORK PRODUCERS COUNCIL, AMERICAN LITTORAL SOCIETY, SIERRA CLUB, INC., NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioners/Intervenors,

—v.—

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MICHAEL O. LEAVITT, Administrator, United States Environmental Protection Agency

Respondents.

Before:

OAKES, KATZMANN, and WESLEY, *Circuit Judges*.

The petitioners challenge an administrative rule promulgated by the United States Environmental Protection Agency in order to regulate the emission of water pollutants by concentrated animal feeding operations. *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (codified at 40 C.F.R. Parts 9, 122, 123 and 412). The petitions for review are granted in part and denied in part.

Id. (emphasis added). Given the ambiguity in the Preamble, and given the fact that at least one state has expressed concern that the Rule prevents the imposition of any state WQBELs, *see* Wisconsin Dep't of Natural Res. Comments on U.S. EPA's Proposed Rule Revisions for Concentrated Animal Feeding Operations at 1 (July 27, 2001), we believe it necessary for the EPA to explain more clearly, on remand, whether in fact states may promulgate WQBELs for discharges other than agricultural stormwater discharges as the term is defined in 40 C.F.R. § 122.23(e) and, if not, why.

Accordingly, we grant the Environmental Petitioners' challenge to the extent that they claim that the CAFO Rule is arbitrary and capricious under the Administrative Procedure Act because the EPA has not sufficiently justified its decision not to promulgate WQBELs for discharges other than agricultural stormwater discharges, as that term is defined in 40 C.F.R. § 122.23(e). Additionally, we grant the Environmenal Petitioners' petition to the extent that it seeks clarification of whether the CAFO Rule bars the states from promulgating WQBELs.[34]

CONCLUSION

For the foregoing reasons, the petitions are granted in part and denied in part. We hereby vacate those provisions of the CAFO Rule that: (1) allow permitting authorities to issue permits without reviewing the terms of the nutrient management plans; (2) allow permitting authorities to

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[34] The Environmental Petitioners moved to clarify and/or supplement the administrative record on appeal to include certain documents exchanged between the EPA and the Office of Management and Budget. They so moved because, in their view, the EPA-OMB documents supported their challenges to (a) the EPA's failure to promulgate WQBELs and (b) the CAFO Rule's new source performance standard for swine, poultry, and veal. Because we have granted both these challenges without even considering the EPA-OMB documents, we deny the Environmental Petitioners' motion as moot.

issue permits that do not include the terms of the nutrient management plans and that do not provide for adequate public participation; and (3) require CAFOs to apply for NPDES permits or otherwise demonstrate that they have no potential to discharge. We also remand other aspects of the CAFO Rule to the EPA for further clarification and analysis. Specifically, we direct the EPA to: (1) definitively select a BCT standard for pathogen reduction; and (2) clarify – via a process that adequately involves the public – the statutory and evidentiary basis for allowing Subpart D CAFO's to comply with the new source performance standard by either: (a) designing, constructing, operating and maintaining production areas that could contain all manure, litter and process wastewater including the runoff and the direct precipitation from a 100-year, 24-hour rainfall event; or (b) complying with alternative performance standards that allow production area discharges, so long as such discharges are accompanied by an equivalent or greater reduction in the quantity of pollutants released to other media. Additionally, we direct the EPA to clarify the statutory and evidentiary basis for failing to promulgate water quality based effluent limitations for discharges other than agricultural stormwater discharges, as that term is defined in 40 C.F.R. § 122.23(e), and also direct the EPA to clarify whether states may develop water quality based effluent limitations on their own. We uphold the CAFO Rule in all other respects.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 123

[FRL–5148–6]

Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the regulations concerning the minimum requirements for federally authorized State permitting programs under section 402 of the Clean Water Act. The proposed rule would explicitly require that State law must provide any interested person an opportunity to challenge the approval or denial of 402 permits issued by the State in State court. The intent of the proposed rule is to ensure that any interested person has the opportunity to challenge judicially the final action on State-issued permits, to the same extent as if the permit were issued by EPA. Most States already have this authority which allows for local resolution of issues. As a result, EPA believes today's proposed rule will apply to a very small number of States with authorization to administer the National Pollutant Discharge Elimination System (NPDES) permit program. EPA is not proposing at this time to establish this requirement for Tribal permitting programs under section 402, but is soliciting comments on various issues related to extending this requirement to Tribes. No Tribes are currently authorized to operate the NPDES program.

DATES: Written comments on this proposed rule must be submitted on or before June 15, 1995.

ADDRESSES: Commenters are requested to submit three copies of their comments to the Comment Clerk for the section 402 Amendment; Water Docket; MC–4101, Environmental Protection Agency, 401 M Street, SW., Washington DC 20460. Commenters who would like acknowledgement of receipt of their comments should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted.

A copy of the supporting information for this proposal is available for review at EPA's Water Docket, room L–102, 401 M Street, SW., Washington, DC 20460. For access to the docket materials, call (202) 260–3027 between 9 a.m. and 3:30 p.m. for an appointment.

FOR FURTHER INFORMATION CONTACT: Laura J. Phillips, Office of Wastewater Management (OWM), Permits Division (4203), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. (202) 260–9541.

SUPPLEMENTARY INFORMATION: Information in this preamble is organized as follows:

I. Summary and Explanation of Today's Action

1. Background

Congress enacted the Clean Water Act, 33 U.S.C. 1251 *et seq.* ("CWA" or "the Act"), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). To achieve this objective, the Act authorizes EPA, or a State approved by EPA, to issue permits controlling the discharge of pollutants to navigable waters. Section 402(a)(1), 33 U.S.C. 1342(a)(1). A State that wishes to administer its own permit program for discharges of pollutants, other than dredged or fill material, to navigable waters may submit a description of the program it proposes to administer to EPA for approval according to criteria set forth in the statute. Section 402(b), 33 U.S.C. 1342(b).

EPA is authorized to treat Indian Tribes in the same manner as States for purposes of certain provisions of the CWA, including section 402. Section 518(e), 33 U.S.C. 1377(e).

EPA's regulations at 40 CFR part 123 establish minimum requirements for federally authorized State permit programs under section 402 of the CWA. These regulations include federally recognized Indian Tribes within the definition of "State." 40 CFR 122.2. EPA is proposing to add language to part 123 that makes clear the intent that, to receive or retain Federal authorization, a State must have laws that afford any interested person the opportunity to challenge in State court the final approval or denial of 402 permits by the State. The intent of this proposal is to ensure that State programs provide the public with an opportunity to challenge final action on 402 permits in State courts, to the same extent as if the permit were federally-issued. EPA is inviting comment on various issues related to extending this requirement to Tribes.

2. Rationale and Authority for Proposed Rule

EPA has become aware of instances in which citizens are barred from challenging State-issued permits because of restrictive standing requirements in State law. EPA believes this is a gap in the regulations setting minimum requirements for State 402 permit programs that needs to be addressed.

A coalition of environmental groups has filed two petitions requesting that EPA withdraw the Virginia State 402 permit program, citing a limitation on citizen standing, among other alleged deficiencies. In particular, they allege that recent changes in the law in the State of Virginia have significantly narrowed the public's opportunity to challenge State-issued 402 permits. Virginia's State Water Control Law, the State law under which Virginia's authorized program is administered, authorizes only an "owner aggrieved" to challenge permits in court. VA Code 62.1–44.29. In 1990, the Virginia legislature amended and narrowed the statutory definition of "owner." The environmental groups allege that under three opinions of the Virginia Court of Appeals and the State Water Control Law, only a permittee has standing to challenge the issuance or denial of a 402 permit in State court. *Environmental Defense Fund* v. *State Water Control Board*, 12 Va. App. 456, 404 SE.2d 728 (1991), *reh'g en banc denied*, 1991 Va. App. LEXIS 129; *Town of Fries* v. *State Water Control Board*, 13 Va. App. 213, 409 SE.2d 634 (1991). See *Citizens for Clean Air* v. *State Air Pollution Control Board*, 13 Va. App. 430, 412 SE.2d 715 (1991)(interpreting similar language in Virginia Air Pollution Control Law). They allege that under these three decisions, riparian landowners, local governments that wish to draw drinking water from the waters in question, downstream permittees, local business and property owners associations, local civic associations and environmental organizations whose members use the waters in question may not challenge a State-issued permit in State court.

The Agency is committed to moving away from permit-by-permit oversight. At the same time, it is critical that EPA continue in its partnership role to support effective State implementation. It is also essential to provide for meaningful local participation and

when calculating application rates. Therefore, manure application rates are determined each year using the same methodology even where nutrient properties change due to variations in weather, sampling methods, and other factors.

A 2011 manure analysis for an agitated sample from (b) (6) returned a value for phosphorus of 13.5 pounds per 1,000 gallons for lagoon. This value appears reasonable. This is consistent with the sample value of 15 pounds per 1,000 gallons of phosphorus (P_2O_5) provided in "Manure Characteristics" by MidWest Plan Service, 2004 (MWPS-18, Table 8, for estimated liquid pit manure characteristics for a dairy herd).

Comment 13: **Commenters expressed concern over use of inflated yields and under representative manure analysis in the MMP to reduce required land application acreage.**

Response 13: See Responses 11 and 12.

Comment 14: **Commenters expressed concern over the use of nitrogen limitation as the basis of manure application in the MMP rather than phosphorus.**

Response 14: Under the NPDES permit requirements, liquid manure application rates shall be based on crop nitrogen requirements or removal, crop phosphorus requirements or removal, restrictions on volume of liquid manure application and application rate restrictions. For phosphorus requirements, see Part VII, A, 4, h. Under provision (2)(iii) of this section, it states that, "the application rate for phosphorus shall not exceed the removal rates for a realistic yield goal of planned crops, unless following the procedures in (h)(3) below." Provision (h)(3)(i) states that, "prior to the land application of manure, a land application site shall be assessed with either the phosphorus index risk assessment procedure or the phosphorus soil test risk assessment procedure in Part VII,C. Under the Phosphorus Soil Test Risk Assessment Procedure, application criteria can be based on recommended nitrogen or phosphate for soils with a Bray P1 less than 40 ppm, recommended nitrogen or phosphate removal, whichever is less, for soils with a Bray P1 between 40 ppm and 100 ppm, or recommended nitrogen or phosphate removal, whichever is less plus an additional distance criteria from surface waters or other

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(f) Open dirt lot.

TABLE 4. Approximate Fertilizer Nutrient Value of Animal Manure at Time Applied to Land - Liquid Handling Systems (a)

Type of Livestock	Bedding vs. No Bedding	Dry matter	Nutrient Content			
			Total N (b)	NH4 (c)	P2O5 (d)	K2O (e)
		(%)	(lb/ton)			
Swine	Liquid pit	4	36	26	27	22
	Lagoon (f)	1	4	3	2	4
Beef	Liquid pit	11	40	24	27	34
cattle	Lagoonf	1	4	2	9	5
Dairy	Liquid pit	8	24	12	18	29
cattle	Lagoonf	1	4	2.5	4	5
Veal calf	Liquid pit	3	24	19	25	51
Poultry	Liquid pit	13	80	64	36	96

(a) Application conversion factors:
1,000 gal = about 4 tons; 27,154 gal = 1 acre-inch

(b) Ammonium N plus organic N, which is slow releasing.

(c) Ammonium N, which is available to the plant during the growing season.

(d) To convert to elemental P, multiply by 0.44

(e) To convert to elemental K, multiply by 0.83.

(f) Includes feedlot runoff water and is sized as follows:
single cell lagoon - 2 cu ft/lb animal weight;
two-cell lagoon - cell 1, 1-2 cu ft/lb animal weight
and cell 2, 1 cu ft/lb animal weight.

TABLE 5. Method of Calculating N Availability of Manures (a)

Available Nitrogen %		Time of Application	Days Until Incorporated (b)
(NH4)	(Org.)	(Date)	(Days)
50	33	Nov-Feb	<5
25	33	Nov-Feb	>5
50	33	Mar-Apr	<3
25	33	Mar-Apr	>3
75	33	May-Jun	<1
25	33	May-Jun	>1
75	15	Jul-Aug	<1
25	15	Jul-Aug	>1
25	33	Sep-Oct	<1
15	33	Sep-Oct	>1

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Appendix to rules 901:10-2-04 and 901:10-2-10: Daily manure production and characteristics, as-excreted (per head per day)

Values are as-produced estimations and do not reflect any treatment. Use these values only for planning purposes. Values do not include bedding. The actual characteristics of manure can vary ±30% from table values due to genetics, dietary options and variations in feed nutrient concentration, animal performance, and individual farm management. Increase solids and nutrients by 4% for each 1% feed wasted above 5%.

Animal	Size[a] (lbs)	Total Manure[b] *Volume and/or Weight of Manure* (lb/day)	(ft³/day)	(gal/day)	Water[c] %	Density[c] (lb/ft³)	Total Solids[d] (lb/day)	Volatile Solids[c] (lb/day)	BOD_5 (lb/day)	Nutrient Content (lb/day) (N)[d]	(P_2O_5)[d]	(K_2O)
Dairy Cattle												
Calf	150	12	0.18	1.38	88	65	1.4	1.2	0.19	0.06	0.01[c]	0.05
	250	20	0.31	2.30	88	65	2.4	2.0	0.31	0.11	0.02[c]	0.09
Heifer	750	45	0.70	5.21	88	65	6.7	5.7	0.69	0.23	0.08[c]	0.23
	1,000	60	0.93	6.95	88	65	8.9	7.6	0.92	0.30	0.10[c]	0.31
Lactating cow	1,000	111	1.79	13.36	88	62	14.3	12.1	1.67	0.72	0.37[c]	0.40
	1,400	155	2.5	18.70	88	62	20.0	17.0	2.34	1.01	0.52[c]	0.57
Dry cow	1,000	51	0.82	6.14	88	62	6.5	5.5	0.75	0.30	0.11[c]	0.24
	1,400	71	1.15	8.60	88	62	9.1	7.7	1.04	0.42	0.15[c]	0.33
	1,700	87	1.40	10.45	88	62	11.0	9.3	1.27	0.51	0.18[c]	0.40
Veal	250	6.6	0.11	0.79	96	62	0.26	0.11	0.04	0.03	0.02	0.05[d]
Beef Cattle												
Calf (confinement)	450	48	0.76	5.66	92	63	3.81	3.20	1.06	0.20	0.09	0.16
	650	69	1.09	8.18	92	63	5.51	4.63	1.54	0.29	0.13	0.23
Finishing	750	37	0.59	4.40	92	63	2.97	2.42[d]	0.60	0.27	0.08	0.17
	1,100	54	0.86	6.46	92	63	4.35	3.55[d]	0.89	0.40	0.12	0.25
Cow (confinement)	1,000	92	1.46	10.91	88	63	11.0	9.38	2.04	0.35	0.18	0.29
Swine												
Nursery	25	1.9	0.03	0.23	89	62	0.21	0.17	0.06	0.02	0.01	0.01
	40	3.0	0.05	0.37	89	62	0.33	0.27	0.10	0.03	0.01	0.02
Finishing	150	7.4	0.12	0.89	89	62	0.82	0.65	0.23	0.09	0.03	0.04
	180	8.9	0.14	1.07	89	62	0.98	0.78	0.28	0.10	0.04	0.05
	220	10.9	0.18	1.31	89	62	1.20	0.96	0.34	0.13	0.05	0.06
	260	12.8	0.21	1.55	89	62	1.41	1.13	0.41	0.15	0.05	0.08
	300	14.8	0.24	1.79	89	62	1.63	1.30	0.47	0.17	0.06	0.09
Gestating	300	6.8	0.11	0.82	91	62	0.61	0.52	0.21	0.05	0.03	0.04
	400	9.1	0.15	1.10	91	62	0.82	0.70	0.28	0.06	0.04	0.05
	500	11.4	0.18	1.37	91	62	1.02	0.87	0.35	0.08	0.05	0.06
Lactating	375	17.5	0.28	2.08	90	63	1.75	1.58	0.58	0.17	0.11	0.13
	500	23.4	0.37	2.78	90	63	2.34	2.11	0.78	0.22	0.15	0.18
	600	28.1	0.45	3.33	90	63	2.81	2.53	0.93	0.27	0.18	0.21
Boar[e]	300	6.2	0.10	0.74	91	62	0.57	0.51	0.20	0.04	0.03	0.03
	400	8.2	0.13	0.99	91	62	0.75	0.67	0.26	0.06	0.05	0.05

368.6 N PC PV
189.3 P2O5

Appendix D Table 1 to rule 901:10-2-14 Phosphate (P_2O_5) Rate for Corn.

	Yield potential - bu/acre				
Soil test	100	120	140	160	180
ppm (lb/acre)	lb P_2O_5 per acre				
5 (10)[1]	85	95	100	110	115
10 (20)	60	70	75	85	90
15-30 (30-60)	35	45	50	60	65
35 (70)	20	20	25	30	35
40 (80)	0	0	0	0	0

[1] Values in parentheses are lb/acre.

Appendix D Table 2 to rule 901:10-2-14 Phosphate (P_2O_5) Rate for Corn Silage.

	Yield potential - tons per acre				
Soil test	20	22	24	26	28
ppm (lb/acre)	lb P_2O_5 per acre				
5 (10)[1]	115	125	130	135	140
10 (20)	90	100	105	110	115
15-30 (30-60)	65	75	80	85	90
35 (70)	35	40	40	45	45
40 (80)	0	0	0	0	0

[1] Values in parentheses are lb/acre.

Appendix D Table 3 to rule 901:10-2-14 Phosphate (P_2O_5) Rate for Soybeans.

	Yield potential - bu/acre				
Soil test	30	40	50	60	70
ppm (lb/acre)	lb P_2O_5 per acre				
5 (10)[1]	75	80	90	100	105
10 (20)	50	55	65	75	80
15-30 (30-60)	25	30	40	50	55
35 (70)	10	15	25	25	30
40 (80)	0	0	0	0	0
[1] Values in parentheses are lb/acre.					

Appendix D Table 4 to rule 901:10-2-14 Phosphate (P_2O_5) Rates for Wheat.

	Yield potential - bu/acre				
Soil test	50	60	70	80	90
ppm (lb/acre)	lb P_2O_5 per acre				
15 (30)[1]	80	90	95	100	105
20 (40)	55	65	70	75	80
25-40 (50-80)	30	40	45	50	55
45 (90)	15	20	20	25	30
50 (100)	0	0	0	0	0

[1] Values in parentheses are lb/acre.

Appendix D Table 5 to rule 901:10-2-14 Phosphate (P_2O_5) Rates for Alfalfa.

	Yield potential - tons per acre				
Soil test	5	6	7	8	9
ppm (lb/acre)	lb P_2O_5 per acre				
15 (30)[1]	115	130	140	155	165
20 (40)	90	105	115	130	140
25-40 (50-80)[2]	65	80	90	105	115
45 (90)	35	40	45	50	60
50 (100)	0	0	0	0	0

[1] Values in parentheses are lb./acre.

Table 1. Identification of Permit Type and Permit Requirements Within State AFO Programs in the United States[1]

State	State NPDES	State Control Mechanism[2] (non-NPDES)		General/ Individual Permits				Permit Conditions[3]			
		Construction	Operating	NPDES		State non-NPDES		Effluent[4]	Management	Land Application	
				General	Individual	General	Individual			Agronomic Rates	Offsite
OH	✓	✓	✓	✓	✓		✓	✓	✓	✓	
OK	✓	✓	✓	✓	✓		✓	✓	✓	✓	
OR	*	✓	✓			✓	✓			✓	
PA	✓		✓	✓	✓			✓	✓	✓	✓
RI	✓				✓						
SC	*	✓	✓			✓	✓	✓	✓	✓	
SD	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓
TN	✓			✓	✓			✓	✓	✓	
TX	✓		✓	✓	✓		✓	✓	✓	✓	
UT	✓	✓	✓	✓	✓		✓		✓		
VA	✓		✓			✓	✓	✓	✓	✓	
VT	✓	✓					✓	✓	✓	✓	
WA	✓		✓	✓	✓	✓	✓	✓	✓	✓	
WI	✓	✓	✓	✓	✓			✓	✓	✓	
WV	✓							✓	✓	✓	
WY	✓	✓			✓		✓	✓	✓	✓	
Totals	38	27	36	20	32	12	31	35	38	40	8

FORM 6: DISTRIBUTION AND UTILIZATION

DISTRIBUTION AND UTILIZATION RECORDS

Quantity (Tons, Gallons, Cubic Yards)	Date	Name and Address	Manure Analysis Given? Y/N	Appendix A – Setbacks, Soils Prone to Flooding, and Most Limiting Nutrient Chart? Y/N	Available Water Capacity (For Liquid Only) Y/N	The Most Limiting Nutrient Chart Y/N
1,843,801	10/4/13	(b) (6) Farms (b) (6) Portage OH	Y	Y	Y	Y
801,899	10/14/13	(b) (6) Farms (b) (6) Portage OH				
1,161,149	10/15/13	(b) (6) Farms (b) (6) Portage OH				
890,885	10/15/13	(b) (6) Farms (b) (6) Portage OH	Y	Y	Y	Y
884,167	10/16/13	(b) (6) Farms (b) (6) Portage OH	Y	Y	Y	Y
918,200	10/29/13	(b) (6) Farms (b) (6) Portage OH				
557,900	10/30/13	(b) (6) Farms (b) (6) Portage OH				
# 83,900	11/1/13	(b) (6) Farms (b) (6) Portage OH				
559,300	11/12/13	(b) (6) Farms (b) (6) Portage OH				
646900	11/13/13	(b) (6) Farm (b) (6) Portage OH				
263,700	11/14/13	(b) (6) (b) (6)				

Please note on a separa[illegible]m any [illegible]s such as manure management meetings, manure bills of sale, or other practices above and beyond rule requirements.

136/2[illegible]1 GAL

EP-30-01 Definitions.

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SECRETARY OF STATE

For purposes of these regulations, EP-30-01 through EP-30-08, the following definitions shall apply:

(A) "Applicable laws" means any applicable provisions of Chapters 3704, 3734, 3745, and 6111 of the Ohio Revised Code, as amended; rules, regulations, and orders of the Ohio EPA; the Clean Air Act, as amended; the Federal Water Pollution Control Act, as amended; and rules and regulations of the Administrator of the United States Environmental Protection Agency.

(B) "Director" means the Director of the Ohio Environmental Protection Agency.

(C) "Incinerator" means any equipment, machine, device, article, contrivance, structure or part of a structure used to burn refuse or to process refuse material by burning other than by open burning as defined herein.

(D) "Install" (Installation) means to construct, erect, locate or affix any source of air pollutants or any treatment works.

(E) "Modify" (Modification) means any

(1) physical change in, or change in the method of operation of,

(a) a source of air pollutants that

(i) increases the amount of air pollutants emitted, or

(ii) results in the emission of any type of air pollutants not previously emitted, or

(iii) results in relocation of the source to new premises, or

(b) a treatment works to allow it to process water pollutants

(i) in materially increased quantities, or

(ii) of a materially different character, or

(2) any material change in the

(a) total capacity, or

(b) finished topography, or

(c) depth of excavation, or

(d) technique of waste receipt, or

(e) type of waste received, or

(f) type of equipment used;

at a solid waste disposal facility, or any other substantial alteration of said facility,

unless performed in response to the terms of a permit or order of the Ohio EPA. The addition of new connections to a public sewerage system shall not be considered a modification of the sewerage system.

(F) "New Source" means a source for which an owner or operator undertakes a continuing program of installation or modification or enters into a binding contractual obligation to undertake and complete, within a reasonable time, a continuing program of installation or modification, after January 1, 1974.

(G) "New source treatment works" means the first treatment works for a new source as defined herein.

(H) "Ohio EPA" means the Ohio Environmental Protection Agency or its Director, as the context or other law or regulations may require.

(I) "Open burning" means the burning of any materials wherein air contaminants resulting from combustion are emitted directly into the ambient air, without passing through a stack or chimney from an enclosed chamber. For purposes of this definition, a chamber shall be regarded as enclosed, when during the time combustion takes place, only such apertures, ducts, stacks, flues, or chimneys as are necessary to provide combustion air and to permit the escape of exhause gas, are open.

(J) "Organic Material" means any chemical compound containing carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides, metallic carbonates and ammonium carbonate.

(K) "Person" means the state, any municipal corporation, political subdivision, public or private corporation, individual, partnership, or other entity.

(L) "Photochemically reactive material" means any liquid organic material with an aggregate of more than 20% of its total volume composed of the chemical compounds classified below or which exceeds any of the following individual percentage composition limitations, referred to the total volume of liquid:

(1) A combination of hydrocarbons, alcohols, aldehydes, esters, ethers or ketones having an olefinic or cyclo-olefinic type of unsaturation: 5 percent;

(2) A combination of aromatic hydrocarbons with eight or more carbon atoms to the molecule except ethyl benzene: 8 percent;

(3) A combination of ethyl benzene, ketones having branched hydrocarbon structures, trichloroethylene or toluene: 20 percent;

Whenever any organic material or any constituent of an organic material may be classified from its chemical structure into more than one of the above groups of organic compounds, it shall be considered as a member of the most reactive chemical group, that is, that group having the least allowable percent of the total volume of liquid.

(M) "Sewage" means only waste products and excrementitious discharge from the bodies of human beings or animals and other household wastes.

(N) "Solid waste disposal facility" means a site or facility that must be licensed under Chapter 3734 of the Ohio Revised Code.

(O) "Source" means any machine, device, apparatus, equipment, operation, building, or other physical facility that emits or generates or may emit or generate any air or water pollutant.

(P) "Treatment works" means any plant, disposal field, lagoon, drain, pumping station, incinerator, or other works used for the purpose of treating, stabilizing, or holding water pollutants.

(Q) "Volatile photochemically reactive material" means any photochemically reactive material which has a vapor pressure of 1.5 psi absolute or greater under actual storage conditions.

(R) "Water Pollutant" means any sewage, industrial waste, or other waste, as defined by Ohio Revised Code Section 6111.01.

(Former regulations AP-9-01 and AP-9-02, adopted July 24, 1972, and effective August 7, 1972, are repealed.)

(Adopted November 30, 1973, effective January 1, 1974.)

AP-9-02. Permits to construct new sources; permits to modify.

(a) General rule. After the effective date of these regulations, no person shall cause, permit, or allow the location, installation, construction, or modification of any air contaminant source without first applying for and obtaining a permit to construct or modify from the Board approving the location and design of such source. The Board shall not approve such location, installation, construction, or modification unless the applicant demonstrates to the satisfaction of the Board that the proposed new or modified air contaminant source will comply with all applicable rules and regulations of the Board.

(b) Application for permit to construct or modify.

(1) Applications for permits required under subsection (a) shall be made on forms prepared by the Board and shall contain such information as the Board shall deem necessary to determine whether the permit should be issued. The information required shall include: descriptions of the equipment and processes involved; the nature, source, and quantity of uncontrolled and controlled emissions; the type, size, and efficiency of control facilities; the quantities and types of raw material used; the suitability of the location and the impact of the emissions from such source upon existing air quality; and such other information as the Board may require.

(2) An application for a permit to construct or modify shall be made for each air contaminant source.

(3) Applications for permits to construct shall be signed by the contractor or agent performing the construction or modification and by the corporate President, or Vice President reporting directly to the President, or highest ranking corporate officer with offices located in the State; or by an equivalently responsible officer in the case of organizations other than corporations; or, in other cases, by the source owner or operator; or, in the case of political subdivisions, by the highest elected official of such subdivision. Such signature shall constitute personal affirmation that the statements made in the application are true and complete, complying fully with applicable state requirements, and shall subject the responsible official to liability under applicable state laws forbidding false or misleading statements.

(4) The applicant's signature shall constitute an agreement that the applicant shall assume responsibility for the construction, modification, installation, or location of such source or facility in accordance with applicable rules and regulations, terms and conditions.

(c) Standards for granting permits to construct or modify. No permit to construct or modify an air contaminant source shall be granted until the applicant demonstrates that it is more likely than not that:

(1) Such proposed new source or modification will operate without preventing or interfering with the attainment or maintenance of any applicable ambient air quality standard, or cause any avoidable degradation in ambient air quality; and,

(2) The emissions from such source shall not exceed applicable emission standards of the Board, or federal Standards of Performance for New Sources promulgated by the Administrator of the Environmental Protection Agency pursuant to Section 111 of the Clean Air Act, whichever are more stringent; and,

(3) Such source or modification is provided, at the expense of the applicant, with any sampling and testing facilities the Board may require, including but not limited to:

(A) Sampling ports of a size, number, and location as the Board may require;

(B) Safe access to each port;

(C) Instrumentation to monitor and record emission data which satisfies the requirements of AP-2-04; and,

(4) Such proposed source or modification incorporates the best available control technology; and,

(5) The proposed source or modification for which the permit is requested will operate in accordance with applicable law.

(d) Action on applications for permits to construct or modify.

(1) The Board shall, within 90 days of the receipt of an application, notify the applicant in writing of its approval, conditional approval, or denial of the application.

(2) If an application is denied, the Board shall set forth its objections in the notice of denial.

(3) The Board shall afford a prompt hearing to any applicant whose application is denied. Where appropriate, the Board may order such hearing held before two hearing examiners appointed by the Board, who may be an attorney at law and an environmental engineer familiar, by virtue of training and experience, with air pollution control technology. At such hearing a stenographic record of the testimony shall be kept. At such hearing, the applicant shall have the burden of proving his case by a preponderance of the reliable, probative evidence. Following the hearing, the hearing examiner shall write their joint, complete findings and conclusions, and shall include a statement of their reasons for crediting the testimony of one witness over another, provided there is a conflict. The hearing examiner shall also recommend action to the taken by the Board, if any, and their reasons for recommending such action. The record of proceedings and the findings, conclusions, reason and recommendations of the hearing examiners shall be kept available for public inspection. The findings, conclusions, reasons and recommendations of the hearing examiners shall be advisory only and not binding upon the Board. Request for such hearing must be made within 10 days of receipt of the notice of denial.

(4) Permits issued hereunder shall be subject to such terms and conditions set forth and embodied in the permit as the Board shall deem necessary to ensure compliance with applicable law.

(e) Cancellation of permits to construct or modify. The Board shall cancel a permit to construct or modify if:

(1) The construction, installation, location, or modification the permit approves is not begun within one year of the date of issuance; or,

(2) During construction, installation, location, or modification, work is suspended for one year; or,

(3) The Board determines that one of the standards under Section 2(d)(4) have been or will be violated.

(f) Possession of a permit to construct shall not relieve any person of the responsibility to comply with applicable emission limitations or other applicable law.

Former regulation AP-9-02 adopted January 28, 1972, and effective February 15, 1972, is repealed.

(Adopted July 24, 1972; effective August 7, 1972.)

AP-9-01. Definitions.

(a) Except as otherwise provided in subsection (b), the definitions in AP-2-01 shall apply.

(b) (1) "Air Contaminant Source" shall mean any operation, machine, device, apparatus, equipment, building, or other physical facility which emits or may emit any air contaminant.

(2) "Modification" shall mean any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(3) "Applicable law" shall, unless otherwise expressly specified, include any applicable provisions of: Chapter 3704 of the Ohio Revised Code, as amended; rules, regulations, and orders of the Ohio Air Pollution Control Board; the Clean Air Act, as amended; rules and regulations of the Administrator of the Environmental Protection Agency.

(4) "Construct" or "construction" shall include any operation resulting in a new source.

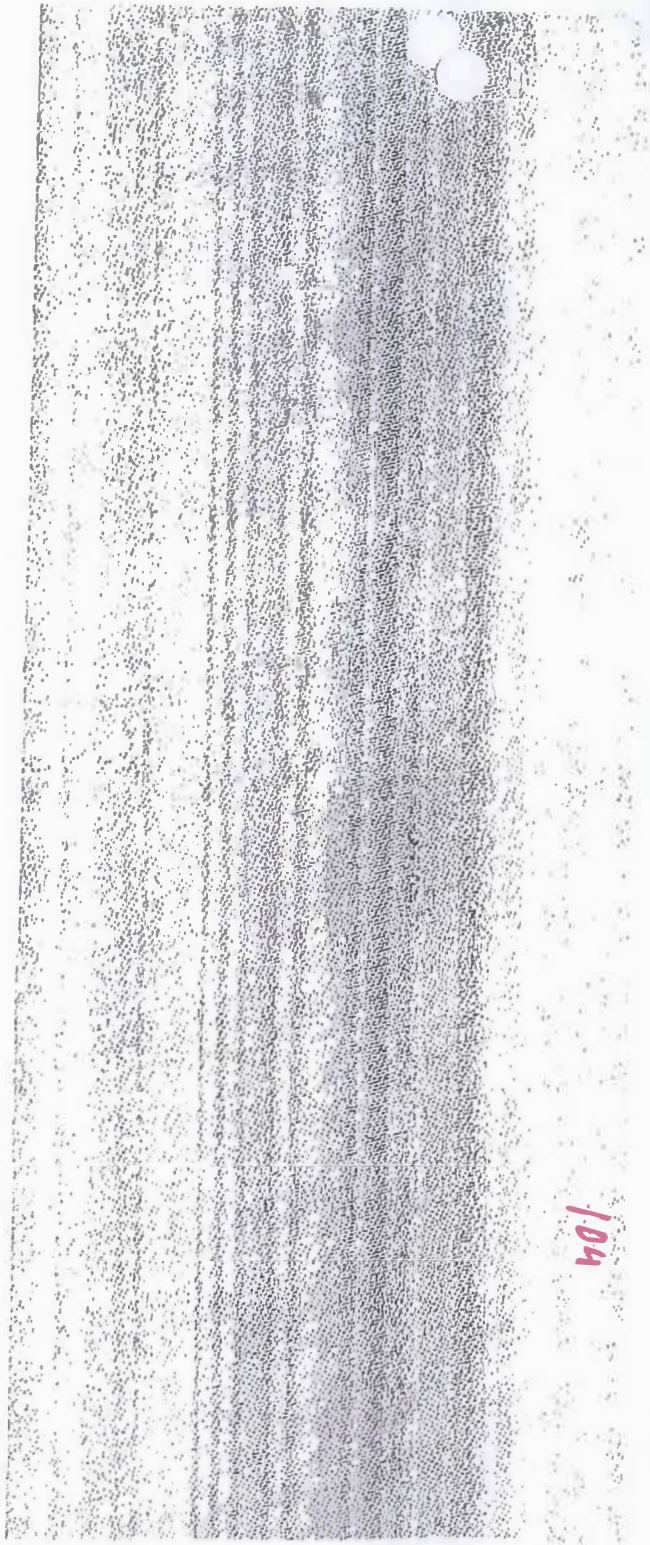
(Adopted January 28, 1972; effective February 15, 1972.)

AP-9-02. Permits to Construct New Sources; Permits to Modify.

(a) General Rule. After the date of adoption of these regulations, no person shall cause, permit, or allow the location, installation, construction, or modification of any air contaminant source without first applying for and obtaining a permit to construct or modify from the Board approving the location and design of such source. The Board shall not approve such location, installation, construction, or modification unless the applicant demonstrates to the satisfaction of the Board that the proposed new or modified air contaminant source will comply with all applicable rules and regulations of the Board.

(b) Application For Permit to Construct or Modify.

(1) Applications for permits required under subsection (a) shall be made on forms prepared by the Board and shall contain such information as the Board shall deem necessary to determine whether the permit should be issued. The information required shall include: descriptions of the equipment and processes involved; the



§ 123.30 Judicial review of approval or denial of permits.

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes.

[61 FR 20980, May 8, 1996]

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{¶ 22} Furthermore, statutory language " 'must be construed as a whole and given such interpretation as will give effect to every word and clause in it.' " D.A.B.E. at ¶ 26, quoting State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn. (1917), 95 Ohio St. 367, 372-373, 116 N.E. 516.

{¶ 23} Although administrative agencies may exercise quasijudicial powers and may have some of the attributes of a court, they are not courts, and under the Ohio Constitution, they cannot be considered as such. Application of Milton Hardware Co. (1969), 19 Ohio App.2d 157, 160, 48 O.O.2d 266, 250 N.E.2d 262.

{¶ 24} In order to endorse ERAC's determination that it possesses jurisdiction over this appeal, we would be required to broadly interpret R.C. 119.092. However, the Ohio Supreme Court has determined that it is "fundamental that when the right to appeal is conferred by statute, the appeal can be perfected only in the mode prescribed by statute." Ramsdell v. Ohio Civ. Rights Comm. (1990), 56 Ohio St.3d 24, 27, 563 N.E.2d 285, citing Zier v. Bur. of Unemployment Comp. (1949), 151 Ohio St. 123, 38 O.O. 573, 84 N.E.2d 746. Moreover, courts have repeatedly required strict statutory compliance with respect to perfecting appeals under R.C. Chapter 119. Harrison v. Ohio State Med. Bd. (1995), 103 Ohio App.3d 317, 659 N.E.2d 368 (where a statute provides for a right of appeal, there must be strict adherence to the statutory conditions); see also Hughes v. Ohio Dept. of Commerce, 114 Ohio St.3d 47, 2007-Ohio-2877, 868 N.E.2d 246; and Drago v. Ohio Dept. of Mental Retardation & Developmental Disabilities, 10th Dist. No. 07AP-838, 2008-Ohio-768, 2008 WL 500908.

{¶ 25} Furthermore, in order to uphold jurisdiction under ERAC's analysis, we would need to ignore the word "court" or substitute the word "tribunal" for the word "court" multiple times throughout R.C. 119.092(C) and ignore the directive set forth in R.C. 119.12 stating that the proper venue is the various courts of common pleas, and thereby create jurisdiction where the statutory language does not. This we cannot do. In interpreting a statute, courts can neither ignore the plain language of the statute, nor insert words or phrases into the statute that have not been placed there by the General Assembly. State v. Craig, 116 Ohio St.3d 135, 2007-Ohio-5752, 876 N.E.2d 957, ¶ 14.

{¶ 26} ERAC is not a court of common pleas or even simply a court. Instead, ERAC is an administrative body that has only those powers that are conferred upon it by statute. ERAC has no inherent authority. The laws of statutory construction simply do not permit us to overlook the use of the word "court" multiple times throughout R.C. 119.092. In addition, the laws of statutory construction also prohibit us from substituting the word "tribunal" for "court" or from inserting the phrase "or tribunal" into those same provisions. Furthermore, we cannot ignore the language in R.C. 119.092 directing these types of appeals to the same "court" to which the party could have appealed the adjudication order of the agency when the statute specifies that "court" is determined under R.C. 119.12, which therein establishes one of the common pleas courts as the appropriate venue. There is, quite simply, no jurisdictional authority here for ERAC to review an appeal of the denial of attorney fees.

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